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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

GEORGE H. SMITH,
REPORTER.

Volume 60.

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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

[No. 10,577.—Department One.]
June 15, 1881.

THE PEOPLE *v.* RICHARD WILLIAMS.*

EMBEZZLEMENT OF SHARES OF STOCK—PROPERTY, DEFINITION OF.—Shares of stock constitute property, and are therefore the subject of embezzlement.

APPEAL from a judgment of conviction, and from an order denying a motion for a new trial, in the Superior Court of San Francisco, Department No. 12. FERRAL, J.

The material facts are stated in the opinion. The appellant contended that shares of stock were not subject to embezzlement, not being tangible, movable, corporeal things, of which only embezzlement could be committed.

Darwin & Murphy, for Appellant.

D. L. Smoot, for Respondent.

* This and the four following cases should have appeared in a former volume of the Reports, but were inadvertently omitted.

Ross, J.:

By the information in this case the defendant was charged with the crime of embezzling certain "shares of stock" of certain mining corporations. The principal point made for the defendant, and the only one we deem it necessary to notice is, that "shares of stock" are not the subject of embezzlement.

Embezzlement is defined by the statute to be "the fraudulent appropriation of property by a person to whom it has been intrusted." If, therefore, shares of stock constitute *property*, they are the subject of embezzlement. And that they do constitute property was determined by us in the case of *Payne v. Elliot*, 54 Cal. 342, where we said: "It is 'the shares of stock' which constitute the property which belongs to the shareholder. Otherwise, the property would be in the certificate; but the certificate is only evidence of the property; and it is not the only evidence, for a transfer on the books of the corporation without the issuance of a certificate, vests title in the shareholder; the certificate is, therefore, but additional evidence of title, and if trover is maintainable for the certificate, there is no valid reason why it is not also maintainable for the thing itself which the certificate represents."

Judgment and orders affirmed.

McKEE and MCKINSTRY, JJ., concurred.

[No. 10,634.—Department One.]

June 15, 1881.

THE PEOPLE v. THOMAS FLANAGAN.

SELF-DEFENSE — MURDER — INSTRUCTIONS. — Upon a trial for murder the Court instructed the jury as follows: To justify the commission of a homicide upon the ground that it was necessary in defense of one's property, it must be made to appear by a preponderance of the testimony that the person killed was manifestly endeavoring *and* intending to commit a felony. A bare trespass upon property does not justify or excuse a homicide. *Held:* The instruction was erroneous.

ID.—ID.—ID.—Every person has a legal right, in defense of his property, to prevent the commission of a felony; and is entitled to use whatever

force may be necessary—even to the extent of taking the life of a felonious aggressor.

In such a case the justification is not made to depend upon a combination of intent *and* endeavor to commit a felony, as erroneously stated in the instruction; either will be sufficient to justify resistance for prevention.

Id.—Id.—Id.—APPARENT NECESSITY.—If from all the evidence in the case the jury should find that the circumstances were such as to excite the fears of a reasonable man, and that the defendant, acting under the influence of such fears, killed the aggressor to prevent the commission of a felony upon his person or property, he would not be criminally responsible for his death.

Id.—Id.—Id.—BURDEN OF PROOF—REASONABLE DOUBT.—The instruction was erroneous also, because it tended to deprive the defendant of the doctrine of reasonable doubt. It is a cardinal rule in criminal prosecutions that the burden of proof rests upon the prosecutor, and that if, upon the whole evidence, including that of the defense as well as that of the prosecution, the jury entertain a reasonable doubt of the guilt of the accused, he is entitled to the benefit of that doubt.

APPEAL from a judgment of conviction and from an order denying a new trial in the Superior Court of Butte County.
HUNDLEY, J.

Jo Hamilton & A. F. Jones, for Appellant.

John Gale, District Attorney, for Respondent.

McKEE, J.:

From a judgment of conviction of murder comes this appeal by the defendant, upon a transcript on appeal which contains only the judgment and charge of the Court.

At the request of the District Attorney the Court below instructed the jury as follows: "To justify the commission of a homicide upon the ground that it was necessary in defense of one's property, it must be made to appear, by a preponderance of the testimony, that the person killed was manifestly endeavoring *and* intending to commit a felony. A bare trespass upon property does not justify or excuse a homicide." This instruction, we think, was erroneous.

It is undoubtedly true, as a legal proposition, that human life can not be taken to prevent a mere trespass upon property. But it is equally true that every person has a legal right, in defense of his property, to prevent the commission of a felony. For the purposes of defense and prevention every one is entitled to use whatever force may be neces-

sary—even to the extent of taking the life of a felonious aggressor (*People v. Payne*, 8 Cal. 341), and a homicide committed under such circumstances is justifiable in law. "Homicide," says the Penal Code, "is justifiable when committed by any person in defense of person or property, against one who manifestly intends or endeavors by violence or surprise to commit a felony." (Subd. 2, § 297, Pen. C.) In such a case the justification is not made to depend upon a combination of intent *and* endeavor to commit a felony as erroneously stated to the jury. Either an intent or endeavor to execute such a design will be sufficient to justify resistance for prevention, in defense of person or property. The law of self-defense is a law of necessity; and that necessity must be real or apparently real. A party acting under it may act upon appearances; and he will be justifiable in acting upon them, even though they turn out to have been false. Whether they were real or apparently real is for the jury, in a criminal case, to decide upon all the circumstances out of which the necessity springs. If from all the evidence in the case they should find that the circumstances were such as to excite the fears of a reasonable man, and that the defendant, acting under the influence of such fears, killed the aggressor to prevent the commission of a felony upon his person or property, he would not be criminally responsible for his death, although the circumstances might be insufficient to prove, by a preponderance of the evidence, that the aggressor was actually about to commit a felony.

To justify the defendant in this case it was not, therefore, necessary for him to prove by a preponderance of evidence that the deceased was actually about to commit a felony upon him. It was sufficient if such a design was made to appear from all the circumstances attending the killing. The instruction as given was therefore erroneous, not only because it tended to deprive the defendant of the benefit of the doctrine of appearances, but also because it tended to deprive him of the doctrine of reasonable doubt.

In substance the jury were told that unless they found that the justification, upon which the defendant relied, was made to appear by a preponderance of the evidence, they must convict. But the testimony may have fallen short of such proof,

and yet have been sufficient in itself, or in connection with the evidence of the prosecution, to create a reasonable doubt of the defendant's guilt, to the benefit of which the defendant was entitled in law. "It is a cardinal rule in criminal prosecutions," says Mr. Justice Rapallo, in *Stokes v. The People*, 53 N. Y. 181, "that the burden of proof rests upon the prosecutor, and that if upon the whole evidence, including that of the defense, as well as of the prosecution, the jury entertain a reasonable doubt of the guilt of the accused, he is entitled to the benefit of that doubt. The jury must be satisfied on the whole evidence of the guilt of the accused; and it is clear error to charge them when the prosecution has made out a *prima facie* case, and evidence has been introduced tending to show a defense, that they must convict unless they are satisfied of the truth of the defense. Such a charge throws the burden of proof upon the prisoner, and subjects him to a conviction, though the evidence on his part may have created a reasonable doubt in the minds of the jury as to his guilt. Instead of leaving it to them to determine upon the whole evidence, whether his guilt is established beyond a reasonable doubt, it constrains them to convict, unless they are satisfied that he has proved his innocence."

Judgment and order denying a new trial reversed, and cause remanded for a new trial.

ROSS and MCKINSTRY, JJ., concurred.

[No. 10,657.—Department Two.]
June 15, 1881.

EX PARTE PATRICK RUSH.

CONTEMPT—JURISDICTION—HABEAS CORPUS.

APPLICATION for discharge on writ of *habeas corpus*. The prisoner was held under a commitment for contempt by the Superior Court of San Francisco, Department No. 10, HALSEY, J., for disobeying an order of the Court requiring him to pay to one Leander Quint the sum of two hundred and sev-

enty-five dollars as attorney's fees due the latter, for directing and managing an estate of which Rush was executor. After commitment Rush petitioned in the Supreme Court for a writ of *habeas corpus*, on the ground that he had no notice of the order and had no opportunity to show cause why he should not be imprisoned for his disobedience.

The petition was granted by Morrison, C. J., and the writ made returnable before the Supreme Court, Department No. 2.

Charles P. Goff, Attorney for Petitioner.

The COURT:

The proceedings required by Section 1212 of the Code of Civil Procedure to bring the petitioner into contempt, were not taken, and therefore he should be discharged. It is so ordered.

[No. 10,579.—In Bank.]

June 28, 1881.

THE PEOPLE v. SING LUM.

APPEAL FROM JUDGMENT—DISMISSAL.—The transcript does not contain the judgment from which the appeal purports to be taken, and the appeal therefore can not be entertained.

FELONY—INSTRUCTIONS.

APPEAL from a judgment of conviction and from an order denying a new trial, in the Superior Court of San Francisco. **FRELON, J.**

W. A. Nygh, for Appellant.

D. L. Smoot, for Respondents.

The COURT:

The appeal is from a judgment of conviction and from an order denying defendant's motion for a new trial. The transcript does not contain the judgment from which the appeal purports to be taken. The appeal from the judgment can not therefore be entertained. The bill of exceptions does not con-

tain any of the evidence given at the trial. The charge of the Court to the jury only is given, with an exception noted to the charge as an entirety. No objection to the charge is urged in the brief which has been filed for the appellant, and we fail to discover any error in it.

Appeal from the judgment dismissed, and order denying the defendant's motion for a new trial affirmed.

[No. 10,600.—Department One.]

Sept. 26, 1881.

THE PEOPLE v. JOHN BIRD.

ASSAULT WITH A DEADLY WEAPON—SUFFICIENCY OF EVIDENCE TO SUSTAIN VERDICT.—Unless the evidence is so slight that the Court below would be justified in directing a verdict for defendant, this Court is not authorized to reverse the judgment upon the ground that the evidence does not sustain a verdict of guilty. If there is a conflict, it is for the jury, under proper instructions, to determine the credibility of witnesses.

ID.—INSTRUCTIONS.—The Court did not err in giving the following instructions: "If the person having the present ability to commit a violent injury upon the person of another, and having with him a deadly weapon, rushes towards such other person with menacing gestures, and with a purpose to use such weapon, an assault is committed, though such person is prevented from striking or using the weapon before he comes near enough to do so."

ID.—RELEVANCY OF INSTRUCTIONS.—The Court charged the jury as follows: "Further in this connection the Court, of its motion, instructs you that if a man has been for a period of two years or thereabouts in the quiet, peaceable, and exclusive possession of a house and certain grounds immediately surrounding the same, and necessary to the comfort and enjoyment of such house, and during such time has resided in such house and has occupied and used such ground with his family, and another person, without his consent, places timbers upon such ground which obstruct the free use and enjoyment of such house and grounds, the man who has so had the possession of said house and grounds and occupied the same with his family, may the next day after the timbers are so placed upon such grounds, remove the same from such grounds. And if it becomes necessary to saw such timbers up to remove them, he may do so. And if he is interfered with in such removal, he may use so much force as is necessary to protect his person in so doing."

Held: As there was no evidence tending to establish the circumstances recited as possible facts, the charge was clearly erroneous.

A PPEAL from a judgment of conviction, from an order de-

nying an arrest of judgment, and from an order refusing a new trial in the Superior Court of the County of Alameda. GREENE, J.

John H. Glascock, A. A. Moore, and W. W. Foots, for Appellant.

George A. Blanchard, Deputy Attorney General, for Respondent.

McKINSTRY, J.:

The defendant was found guilty of an assault with a deadly weapon—a pistol charged with gunpowder and leaden bullets.

It is insisted upon the part of the defendant, appellant, that the evidence was insufficient to sustain the verdict. This Court has jurisdiction in certain criminal cases "on questions of law alone." Unless the evidence is so slight as that the Court below would be justified in directing a verdict for defendant, we are not authorized to reverse a judgment upon the ground that the evidence does not sustain a verdict of guilty. If there is a conflict, it is for the jury, under proper instructions, to determine the credibility of witnesses. It would extend our opinion to great length, without subserving any useful purpose, to recite any portion of the testimony. We are of opinion that the testimony of the prosecuting witness, if he was believed to swear truly, strongly tended to establish the commission by defendant of the felony charged.

It is said that the Court below erred in giving the instruction following: "If the person having the present ability to commit a violent injury upon the person of another, and having with him a deadly weapon, rushes toward such other person with menacing gestures and with a purpose to use such weapon, an assault is committed, though such person is prevented from striking or using the weapon before he comes near enough to do so."

There was evidence tending to prove that defendant "rushed" toward the prosecuting witness, and that he gestured "menacingly;" his "purpose" or intent was left by the instruction to the jury. The instruction does not, in terms, say that the alleged assailant must reach a point near enough

to inflict a wound, although that is implied from the words, "though such person is prevented from using the weapon." The illustration of counsel, which supposes a person moving from San Francisco to assault another in Sacramento, and who is stopped at Benicia, is hardly applicable. The instruction, while expressed in general terms, is not abstract, but is to be construed with reference to the phase of the actual evidence which the jury might adopt.

The Court charged the jury as follows: "Further in this connection the Court, of its own motion, instructs you that if a man has been for a period of two years or thereabouts in the quiet, peaceable, and exclusive possession of a house and certain grounds immediately surrounding the same and necessary to the comfort and enjoyment of such house, and during such time has resided in such house and has occupied and used such ground with his family, and another person, without his consent, places timbers upon such ground, which obstruct the free use and enjoyment of such house and grounds, the man who has so had the possession of said house and grounds, and occupied the same with his family, may the next day after the timbers are so placed upon such grounds, remove the same from such grounds. And if it becomes necessary to saw such timbers up to remove them, he may do so. And if he is interfered with in such removal, he may use so much force as is necessary to protect his person in so doing."

In this charge the Court did not assume the existence as facts of the matters recited in it, but they were presented hypothetically. Nevertheless, unless there was evidence tending to establish the circumstances recited as possible facts, the charge was clearly erroneous. It assumed the possible existence of facts which might materially affect the question whether either the prosecuting witness or the defendant was acting in defense of his property, and throw light upon the intent of the latter. There was no evidence in the transcript that the prosecuting witness had been "for a period of two years in the quiet, peaceable, and exclusive possession of a house and certain grounds surrounding the same, and necessary to the comfort and enjoyment of such house;" or, that "during such time" he had "resided in such house and occu-

pied such grounds with his family;" or, that "another person, without his consent," had placed "timbers upon such ground;" or, of any other of the matters which the instruction assumes may have existed or occurred.

The bill of exceptions contains all the evidence introduced at the trial.

Judgment and order reversed, and cause remanded for a new trial.

ROSS and McKEE, JJ., concurred.

[No. 8,147.—In Bank.]

Jan. 19, 1882.

H. M. NAGLEE v. FRANCIS E. SPENCER, JUDGE, ETC.

APPEAL—JURISDICTION—MOTION FOR NEW TRIAL.—An appeal from a judgment does not divest the trial Court of jurisdiction to hear and determine a motion for a new trial.

APPLICATION for writ of *mandamus*.

William Matthews, for Plaintiff.

J. C. Black, for Defendant.

The COURT:

The appeal from the judgment did not divest the trial Court of jurisdiction to hear and determine the motion for a new trial.

Let the writ issue as prayed for.

[No. 8,018.—Department Two.]

Jan. 19, 1882.

J. R. HOWARD v. J. W. GALLOWAY ET AL.

JUDGMENT BY DEFAULT—AFFIDAVIT OF SERVICE OF SUMMONS.—An affidavit of service of summons by a person other than the Sheriff, which fails to state that he was over eighteen years of age at the time of service, is insufficient to prove service or to sustain a judgment by default.

ID.—APPEAL—PRACTICE.—The defendant has a right to appeal from a judgment by default without moving to set aside the default or otherwise proceeding in the Court below.

ID.—ID.—ID.—CASES OVERRULED.—*Guy v. Ide*, 6 Cal. 99, and the cases following it were virtually overruled in *Hallock v. Jaudin*, 34 Id. 172.

APPEAL by defendant Annie B. Galloway, and Annie B. Galloway, executrix of J. W. Galloway, deceased, from a judgment for the plaintiff in the Superior Court of the City and County of San Francisco. HUNT, J.

George Turner, for Appellant.

P. B. Ladd, for Respondent.

THORNTON, J.:

The judgment in this case against Annie B. Galloway, in her own proper person, and against her as executrix of Joseph Galloway, deceased, was by default. She (the only party appealing) makes the point that there is no proof of service of summons on her in either capacity, as above stated, and therefore the judgment was rendered without jurisdiction. On examination of the proof of service, it appears to be clearly defective. The service was not made by the Sheriff, and the affidavit does not state that the person making the service was over eighteen years of age at the time of service, as required by statute. (C. C. P., § 410.) On such proof, the Court below could not render a judgment by default. (*Maynard v. McCrellish*, 57 Cal. 355.) The defendant had a right, then, to appeal from such a judgment without moving to set aside the default, or other proceedings, in the Court below. (*Hallock v. Jaudin*, 34 Cal. 172.) We consider *Guy v. Ide*, 6 Cal. 99, and the cases following it, virtually overruled in *Hallock v. Jaudin*, above cited, where the question is fully discussed. The defendant had a right to appeal from the judgment, or to move in the Court below. Both remedies are given, and the defendant had a right to avail herself of either, and *probably* of both.

The judgment is erroneous as to the defendant above named. And as to her in both capacities in which she was sued, the judgment is reversed and the cause remanded.

MYRICK and SHARPSTEIN, JJ., concurred.

[No. 8,047.—Department One.]

Jan. 19, 1882.

SAN FRANCISCO AND NORTH PACIFIC RAILROAD COMPANY v. THE STATE BOARD OF EQUALIZATION.

TAXATION—ASSESSMENT—STATE BOARD OF EQUALIZATION—RAILROAD CORPORATIONS—CONSTITUTIONAL LAW.—The provision of Section 10, Article xiii, of the Constitution, that the property of railroads operated in more than one county shall be assessed by the State Board of Equalization, is clearly self-executing, and the power thus conferred may be exercised without the aid of any statute.

ID.—POLITICAL CODE—TITLE OF ACT—CONSTITUTIONAL LAW.—The title of the Act of March 23, 1880, entitled "An act to amend Sections 3607, 3617, 3627, 3628, 3629, 3630, 3634, 3640, 3643, 3650, 3651, 3652, 3663, 3673, 3678, 3679, 3717, 3730, 3752, 3756, 3839, 3861, and to repeal Sections 3680, 3687, of an act entitled "An act to establish a Political Code, approved March 12, 1872, relating to revenue, and to add two new sections numbered 3664, 3665," sufficiently expresses the subject of the act.

ID.—STATE BOARD OF EQUALIZATION—EQUALIZATION OF ASSESSMENT ROLL—NOTICE.—Section 9, Article xiii, of the Constitution, so far as it relates to the State Board, has reference to equalization *between counties*; and the same is true of Subdivision 9, Section 3692, of the Political Code.

ID.—ID.—ID.—The State Board has not the power to increase or lower any individual assessment.

ID.—STATE BOARD OF EQUALIZATION—RAILROAD CORPORATIONS—EQUAL PROTECTION OF THE LAWS—CONSTITUTIONAL LAW.—The provision of the Constitution requiring the property of railroad companies operated in more than one county to be assessed by the State Board of Equalization, is not in conflict with the provision of the fourteenth amendment of the Constitution of the United States, that "no State shall deny to any person the equal protection of the laws." The fact that the value of one kind of property is to be ascertained by one officer or board, and the value of another by another—each clothed with the duty and responsibility of ascertaining the *actual* value—does not operate to deprive the owners of either kind of property of legal protection.

ID.—ID.—ID.—CONSTITUTIONAL LAW—LOCAL OR SPECIAL LAW.—As to the proposition that Section 10 of Article xii conflicts with Subdivision 10 of Section 25 of Article iv, without pausing to inquire which of the two provisions should be disregarded if they could not co-exist, it is enough to say that the section of the Constitution first mentioned is not "a local or special law," passed by the Legislature.

ID.—ID.—ID.—ASSESSMENT—STATEMENT.—The sworn statement required of the president of railroad corporations by Section 3664, Political Code, is not binding upon the Board, and may be disregarded by it in the assessment.

- ID.—ASSESSMENT—RAILROADS—DESCRIPTION OF ROADWAY.**—A description of the “roadway,” by giving the *termini*, courses, and distances, is sufficient.
- ID.—STATE BOARD OF EQUALIZATION—ASSESSMENT OF RAILROADS—CITY AND TOWN TAXATION.**—It is not necessary, in the present case, to decide whether Section 10 of Article xiii of the Constitution intends to make the assessment by the State Board of railroad property the assessment upon which the taxes in cities, etc., on such property shall be collected for local purposes. Even if Sections 3664–3665, Political Code, were of no effect so far as they make their assessment the basis of city and town taxation, the assessment involved in this case would be valid for other purposes.
- ID.—ID.—ID.—FISCAL YEAR.**—The Political Code (§ 3692) provides that the State Board of Equalization shall assess railroad property annually, on or before the first Monday in March. The order of assessment thus made need not declare the particular fiscal year or years to which it is applicable.
- ID.—ID.—ID.**—In this case the order assesses separately the franchise, roadway, roadbed, rails, and rolling stock, and it is therefore unnecessary to determine whether it was obligatory on the Board to do so.
- ID.—ID.—ID.—APPORTIONMENT.**—The Constitution does not in terms require that the assessed value of each item should be separately *apportioned*, and that the Political Code does not contemplate such separate distribution is sufficiently apparent from Section 3650.
- ID.—ID.—ID.—EQUALIZATION—PETITION.**—By Section 3664, Political Code, the Board must meet on or before the third Monday of August to equalize the valuation of property *as between the several counties*; but a reconsideration (or equalization) of the assessment of railroad property can only be made by the Board in case a petition shall be filed by a party interested within *five days* after the assessment is made and entered.
- ID.—ID.—ID.—DOUBLE TAXATION—ROADBED—ROADWAY—SUPERSTRUCTURE—DEFINITION.**—The *roadbed* is the foundation on which the superstructure of a roadway rests; the roadway is the right of way—which is property liable to taxation; the rails in place constitute the superstructure. An assessment of these items separately does not constitute double taxation.
- ID.—ID.—ID.—APPORTIONMENT.**—The Constitution does not require that the apportionment to cities and towns and to counties shall be one act.
- ID.—AMENDMENT OF CODE—TITLE OF ACT—CONSTITUTIONAL LAW.**—The Act of May 12, 1881, is entitled, “An act to amend Section 3713 of the Political Code, and to provide for the *levy of the tax for State purposes for the thirty-third and thirty-fourth fiscal years.*” *Held:* The title distinctly expresses the single object of the Act.
- ID.—CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER—CASE DISTINGUISHED.**—The act referred to does not attempt to confer the power of levying a tax upon the State Board. In *Houghton v. Austin*, 47 Cal. 646, it was held that Section 3666 of the Political Code, as the section read originally, in so far as it delegated to the State Board the power to fix the rate of taxation, “after allowing for delinquency in the collection of taxes,” was unconstitutional, because it was a delegation of legislative power. That section left it entirely in the hands of the Board

to add any sum of percentage they might deem proper in anticipation of possible delinquencies. Such attempted delegation of legislative power is not found in the act now under consideration.

APPLICATION for writ of *certiorari*.

James A. Johnson, Lloyd, and Wood, Attorneys for Plaintiff.

The State Board of Equalization had no authority to make the assessment complained of without first ascertaining the value of the property according to some law, order, or rule having the force of law regulating its mode of action. (Const. Cal., Art. xii, §§ 1, 9; Art. i, § 13; Pol. C., § 3692; *Wells, Fargo & Co. v. State Board of Equalization*, 56 Cal. 194.) "The value is to be ascertained as provided by law." Potter's Dwaris on Statutes, etc., 395, 403; *People v. Hastings*, 29 Cal. 449; *People v. Sneath*, 28 Id. 615.)

There is no authority given the Board by the Constitution to levy any tax or to make its assessments of railroad property the basis of taxation; that authority, whatever it may be, is given by the Code. (Pol. C., §§ 3628, 3664, 3665, 3692, 3693, 3696, and 3713.)

Sections 3664-3665, Pol. C., as amended 1880, are void, because the title of the Act does not designate the Code to which they are added, nor express the subject thereof. (Const. Cal., Art. iv., § 24; *Leonard v. January*, 56 Cal. 1; *Earle v. Board of Education*, 55 Id. 489; *Bernard v. University*, 57 Cal. 612.)

The Board has failed to comply with Section 9, Article xiii, Constitution of California, which requires it to give notice according to some rule of whatever it assumes to do. It has also failed in this regard to comply with the directions contained in Sections 3692-3693, Political Code.

The authority attempted to be conferred, or at least that claimed as being conferred upon the State Board, is in violation of Section 1, Article xiv of the Amendments to the Constitution of the United States. (*In re Ah Fong*, 3 Saw. 157.) Such power would also be in violation of Subdivision 10, Section 25, Article iv of the Constitution of the State.

The sworn statement of petitioner, made in due form as required by Section 3664, Political Code, had to be taken as

true, unless controverted after general investigation. (Pol. C., §§ 3664, 3693.)

No investigation, evidence, or statement was had or received by the Board, except petitioner's sworn statement above mentioned.

The attempted assessment of the roadway is void for want of description. The description must be by metes and bounds. (Pol. C., § 3664.) Sections 3664-5, Pol. C., so far as they attempt to make the assessment of the State Board valid for taxation purposes in counties, cities, towns, townships, and other local taxing districts, are void. (Const. Cal., Art. xii, §§ 12, 13; Art. iv, § 25, Subd. 9 and 10.)

The order of assessment is made for the year 1881. There is no such fiscal year. The statute authorizing a tax based upon the assessment of the Board, declares that such tax shall be for the fiscal years 33-4. No law has declared that the valuation made by the State Board of property as it existed on the first Monday in March, 1881, should be the assessment and basis of taxation for the thirty-third fiscal year. If the valuation so made be good under the tax levy act (§ 3713, Pol. C.) for the thirty-third fiscal year, it must of necessity be good for the thirty-fourth fiscal year.

The apportionment is void, because it blends all the items of property in one. (Const. Cal., Art. xiii, §§ 2, 3; *People v. Hastings*, 29 Cal. 451; *People v. Sneath*, 28 id. 615.)

The act of assessing and that of equalization are distinct, and could not have been performed at the same time. No provision is made for the equalization of the assessment after notice and an opportunity for hearing on the part of the owner of the property assessed. (*Wells, Fargo & Co. v. The State Board of Equalization*, 56 Cal. 194; *State Board of Equalization v. Supervisors of Sacramento County*.)

Double taxation is forbidden by law; therefore, the Board of Equalization erred in assessing the roadway, roadbed, and rails in the place separately, as they are all together but one—the road or roadway.

It is the duty of the Board to apportion the amount assessed, and the length of road, to each of the counties, cities and counties, cities, towns, townships, and districts. This the

Board has not pretended to do, but has contented itself with the apportionment to the counties only.

The apportionment is as much a part of the act of assessing as the valuation of the property, and without such apportionment every other act is absolutely void. If Section 3664, Political Code, should be held to mean that the County Boards can make the apportionment for the purposes of local taxation, then the section is in violation of the article and section of the Constitution above referred to, and is void. It would also violate the provisions of Sections 12 and 13, Article xi, of the Constitution.

The Act of the Legislature commonly known as the Tax Levy, which went into effect May 12, 1881, is void. 1. Because the objects of the Act are not expressed in the title. (Art. iv, § 24, Const.) 2. Because it confers the power of fixing or levying the tax on the State Board of Equalization. (See Art. xi, § 13; Art. xiii, § 6.) The sovereign power of taxation for State use can not be delegated by the Legislature to the State Board of Equalization.

A. L. Hart, Attorney General, for Respondent.

The power to make the said assessment, and to apportion the same, is clearly conferred upon the respondent by Section 10 of Article xiii of the State Constitution, and that section is self-executing. (*People v. Supervisors of Sacramento County.*)

It is argued by petitioner, however, that the foregoing provision of the Constitution is in conflict with the Constitution of the United States, because, as is alleged by petitioner, no provision is made for the equalization of the said assessment after notice and an opportunity for a hearing on the part of the owner of the property assessed; and, in support of this proposition, reliance is placed upon the fifth and fourteenth amendments to the Constitution of the United States. The vice of this argument is, that it is based upon the assumption that no provision is made in the Constitution for the equalization of assessments made by the State Board of Equalization, when in fact such provision is clearly and unquestionably made. (Const. Cal., Art. xiii, § 9.)

The only difference between the assessment of this and of other kinds of property, that can be found in the Constitution, is, that the value of the one is primarily determined by the State Board of Equalization, while the other is assessed by the county assessors and other local authorities. Assessments of this, as of all other kinds of property, go upon the county assessment roll for the purposes of State and county taxation.

The language of Section 9, of Article xiii, conferring upon the Boards of Equalization the power to equalize by raising or lowering the "entire assessment roll, or any assessment contained therein," is sufficient, therefore, to cover assessments of the character herein complained of. Plainer or less ambiguous language could not have been used to express the will of the people; and in whatever manner the powers conferred by that section may be distributed, it can not be denied that the sum total of all the powers possessed by both the Boards extend, to the equalization of all kinds and classes of property, whether it belongs to persons or to corporations.

The power to equalize such assessment being conceded, no doubt can remain as to the validity of Section 10, of Article xiii, under the provisions of which the State Board of Equalization unquestionably has the jurisdiction to make the orders herein complained of, and hence this proceeding must be dismissed.

It is not conceded, however, that the rule established in the case of *Mulligan v. Smith* is applicable to the general tax system under which the revenues of Government are collected. "The existence of Government depending on the prompt and regular collection of revenue must, as an object of primary importance, be insured in such a way as the wisdom of the Legislature may prescribe. There is a tacit condition annexed to the ownership of property that it shall contribute to the public revenue in such mode and proportion as the legislative will shall direct." (Cooley on Taxation, 39.)

The power of taxation is necessarily unlimited in every State, and the doctrine of "due process" is not applicable to the exercise of that power. "A legislative act,

when clearly within the limits of legislative authority, is, of itself, the law of the land." (Cooley on Taxation, 38; *Weimer v. Bunbury*, 30 Mich. 202.)

It results that the State Board had the power, under the Constitution, to assess the property of the petitioner, and any error committed by that Board, whether of law or of fact, was committed in the exercise of an exclusive jurisdiction conferred by the organic law. (Cooley on Taxation, 533, 534, 527, 540; *State R. R. Tax Cases*, 92 U. S. 575.)

It was proper for the Board to ignore the statement furnished to it by petitioner in the petition, and to proceed to fix the value of and assess the property of petitioner, for the reason that the statement furnished did not conform to the requirements of Section 3664 of the Political Code, and hence was no statement at all.

The statement furnished being lacking in these essentials required by statute, could properly be considered by the Board as no statement at all, and hence ignored by them; and thereupon the Board had but one course to pursue, as designated by statute—to proceed, notwithstanding the failure of petitioner to furnish a proper statement, and fix the value of and assess the property of petitioner; which valuation, when so fixed, is final and conclusive.

It is urged, however, that the assessment of the property of petitioner was made without notice to petitioner, and without the Board of Equalization having ever made any rules or regulations governing the assessment or valuation of railway property. There is nothing in the Constitution or statutes requiring such notice, or pointing out specifically the manner to be pursued by the Board in making assessments and fixing valuations. This being so, the Board may adopt such a mode of proceeding as appears to it suitable and proper. (C. C. P., § 187; *Mawson v. Mawson*, 50 Cal. 539; *Estate of McCauley*, Id. 544.)

If petitioner was dissatisfied with the assessment levied against its property, the law provided a remedy: to apply, within five days thereafter, by written petition, to have the assessment corrected in any particular. When such petition is filed, the Board must fix a time for hearing, and must,

upon such hearing, receive such proof as may be offered. (Pol. C., § 3664.)

The point made in the brief of petitioner, that the State Board of Equalization failed to comply with Section 9, Article xiii of the Constitution, relative to the giving of notice, is entirely without support from the reading of the section referred to. The section has no reference to the original assessment. Such original assessment may be made without notice. The section of the Constitution applies only to proceedings taken by the Board to equalize assessments already made. In the case of petitioner, since no proceedings were taken to change or equalize the assessment after it was made, it is to be presumed that both petitioner and the Board were at the time satisfied with the assessment as made.

James A. Johnson and Lloyd & Wood, for Plaintiffs, in reply.

The power conferred upon the State Board of Equalization relative to the assessment of railroads operated in more than one county is in violation of the Fourteenth Amendment to the Constitution of the United States.

An obligation rests upon every property owner to contribute his proportionate share to the support of the Government. To enforce this obligation, the Constitution of the State of California provides a system applicable to the great mass of property, the salient features of which are that all property shall be taxed in proportion to its value, to be ascertained as provided by law. (Art. xiii, § 1.) That property shall be assessed in the county, city, or district in which it is situated, in the manner prescribed by law. (Art. xiii, § 10.) That the Boards of Supervisors must equalize the valuation of the taxable property of the county (Art. xiii, § 9), and that a State Board of Equalization shall equalize valuations as between the counties. (Id.)

This system requires legislation to carry it into effect—the manner of assessment and the means by which the proportions are to be ascertained are left to legislation, except in so far as means for the latter purpose are found in the constitutional requirements relative to the Boards of Equalization. The legislation providing the manner of assessment and the

means of ascertaining proportions must be had in subordination to the constitutional provisions that "all laws of a general nature shall have a uniform operation" (Art. i, § 12); that "no local or special laws" shall be enacted "for the assessment or collection of taxes" (Art. iv, § 25, Subd. 10); that "privileges and immunities" shall not be granted to any citizen or class of citizens "which, upon the same terms, shall not be granted to all citizens" (Art. i, § 21); and that no person shall "be deprived of life, liberty, or property, without due process of law." (Art. i, § 13.)

All of the safeguards compatible with the power involved, are thrown around its exercise. The right of local self-government is acknowledged, for the assessment must be made by local officers. That each person is to pay a local tax in proportion to the value of his property, is admitted in the creation of a local board to adjust proportions. That the State tax is to be apportioned so that equality is preserved between the taxpayers of different localities, a State board has been created to adjust proportions between the localities; but above all, the right of every person to be heard, at some point of time before his liability becomes fixed, is recognized as a fundamental principle.

Having instituted this system, co-extensive in its operation with the territorial limits of the power levying the tax, and including within its scope all kinds of property, the same Constitution provides: "The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this State, shall be assessed by the State Board of Equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships and districts."

Franchises, roadways, roadbeds, rails, and rolling stock, as separate and distinct classes of property, are not withdrawn from the operation of the general rule, for such property, when not owned by railroad companies, or even when owned by railroad companies, the roads of which are operated in a single county, are governed by the general rule

Property situated partly in one county and partly in another, is not, as a class, so withdrawn, for lands and houses so situated fall within the general rule. Property operated in more than one county is not, as a class, so withdrawn, for telegraph lines, water, ditches, flumes for transporting lumber for hire, stage and freight lines, turnpike roads, and other property so operated, fall within the general rule.

If a classification based upon use is admissible, none such has been made, for all property used in more than one county has not been included. If a classification based upon ownership is admissible, not such has been made, for all property owned by persons operating in more than one county has not been included.

Locomotives, as a species of property, are not to be assessed by the State Board; but whether they are to be so assessed is made to depend upon whether they are owned by given persons or corporations. In other words, the discrimination is in part, between owners of the same species of property.

No class or genus or even species of property has been separated from the great mass and made subject to a special rule, but certain property has been taken out of the rule applicable to its species, and has been made, by reason of its ownership, subject to the special rule, and, as to it, none of the safeguards thrown around the enjoyment of other like property has been preserved.

No local assessor may fix its value; no local board may consider it in adjusting proportions for local taxation. Its owner may not appeal to the local tribunal open to the owners of other property. (*State Board of Equalization v. Board of Supervisors of Sacramento County.*) The clause of the Constitution, which attempts to confer the whole power of valuation upon the State Board of Equalization, is arbitrary and self-executing. The Board may exercise its power unrestrained by the established principles of private rights and distributive justice.

The power of this board under the Constitution is strongly but accurately stated by the Attorney General in his brief filed in the Supreme Court of California in the case of the *San Francisco and North Pacific Railroad Company v. The State Board of Equalization*. (Brief, p. 11.) Says the

learned Attorney General: "There is nothing in the Constitution or statutes requiring such notice (a notice of some kind to the property owner before his liability is fixed), or pointing out specifically the manner to be pursued by the Board in making assessments and fixing valuations. This being so, it may adopt such a mode of proceeding as appears to it suitable and proper. * * * If the Board has adopted no general rules applicable to all cases, then whatever manner was adopted by the Board to make the present assessment complained of became the rule of this case. The Board, having authority to make rules for its government, can change such rules as often as it sees fit; can adopt a new rule for each case that comes before the Board, if it desires so to do."

From the time of the establishment by James II. of the "High Commission" to the time of the creation of the State Board of Equalization in California, no tribunal has existed, either in England or America, which even claimed the right to deal with life, liberty, or property, subject to no rules except those of its own pleasure, and changeable at its own will.

It becomes a Court to pause before giving ear to the monstrous pretensions of the State Board of Equalization, voiced by the Attorney General. Nearly two centuries have elapsed since the unlimited power to deprive the citizen of property, except in accordance with the "laws of the land," has been asserted in any country where the English language prevails. It is historical that the "High Commission" dared not enforce its judgments against property, because an attempt to do so would enable the party injured to invoke the jurisdiction of the common law Courts. That the Solicitor General shrank from facing such a Court, packed even though it was with a claim that the "High Commission," in passing upon property rights, "could make rules for its own government, change such rules as often as it saw fit, and adopt a new rule for each case if it desired so to do."

Lord High Steward Jeffries' answer to the Bishop of London, descriptive of the powers of that tribunal, "This Court does not proceed upon written allegations; its proceedings are summary and by word of mouth; no fixed mode of procedure, no rules of evidence govern its movements," is the same

description which the Attorney General gives of the powers of the State Board of Equalization. The existence of unlimited power, the Attorney General feels, must be maintained, or all proceedings of the State Board of Equalization applicable to the case in hand must fall. The Federal Constitution forbids the exercise of such powers.

The provision of the State Constitution making the discrimination and conferring the power in question is obnoxious to the fourteenth amendment to the Federal Constitution.

1. It denies to persons within the jurisdiction of the State the equal protection of the laws; and,

2. It deprives such persons of their property without due process of the law.

The provision of the State Constitution which provides for the assessment of the property of railroad companies operating in two or more counties, denies to such companies the protection of the general rules prescribed in the same Constitution, and is therefore void.

The people of the United States have ordained (§ 1, Art. xiv, Const. of U. S.) that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * * nor deny to any person within its jurisdiction the equal protection of the law."

These inhibitions upon the States apply "to all the instrumentalities and agencies employed in the administration of its government." (*Ah Kow v. Nunan*, 3 Saw. 552.)

"It is doubtless true that a State may act through different agencies—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all actions of the State denying equal protection of the laws, whether it be action by one of these agencies or by another." (*Virginia v. Rives*, 100 U. S. 318; *Ex parte Virginia*, Id. 346.)

The language of the Fourteenth Amendment, in so far as it deals with "privileges and immunities," is not new even to the Federal Constitution.

The second section of Article iv of the Federal Constitution, declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

The section last cited has universally been held, among other things, to mean that the citizens of all the States shall have the peculiar advantage of acquiring and holding real as well as personal property, and that such property shall be protected and secured by the laws of the State in the same manner as the property of the citizens of the State is protected, and that such property shall not be liable to any taxes or burdens which the property of the citizen is not subject to. (*Campbell v. Morris*, 3 Har. & M. 554; *Corfield v. Corryell*, 4 Wash. 371; *Ward v. Morris*, 4 Har. & M. 338; *Wiley v. Parmer*, 14 Ala. (N. S.) 632; *Crandall v. State*, 10 Conn. 343; *Oliver v. Washington Mills*, 11 Allen, 281.)

The object of this constitutional provision was to prevent discriminations in these respects between citizens of the State in which the law was enacted, and citizens of other States in the Union. The prohibition referred to and contained in the Fourteenth Amendment is in the same words, but is directed to the States, and forbids discrimination between citizens of the same State.

The last clause of Section 1, Article xiv, Federal Constitution, forbids any State "to deny to any person within its jurisdiction the equal protection of the law."

Equality of protection is assured to every one. The prohibition "implies not only," says Mr. Justice Field (*Ah Kow v. Nunan*, 3 Sawy. 552), "that the Courts of the country shall be open to him on the same terms as to all others, for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts; but that no charges or burdens shall be laid upon him which are not equally borne by others." (*Missouri v. Lewis*, 101 U. S. 22.)

In the case cited it was held, substantially, that a State may establish one system of law in one portion of its territory, and another system in another; provided, always, that it neither encroaches upon the proper jurisdiction of the United States, nor abridges the privileges and immunities of citizens of the United States, nor deprives any person of his rights without due process of law, nor denies to any person within its jurisdiction the equal protection of the laws.

To maintain the validity of the Constitution of the State of California in respect to the subject-matter of this action,

it must be held that every other taxpayer in a county, except the parties in interest here, may apply to the local Board of that county acting in a judicial capacity, to redress a wrong done by an assessor in the valuation of his property, or to relieve him of a burden not equally borne by others; but the parties in interest here can not so apply. Can a law which admits of a proposition so monstrous, be upheld in the very face of a constitutional provision which may be summed up in a single sentence—"The equality of all before the law?"

The new Constitution of California (Art. ii, § 11) provides, that "all laws of a general nature shall have a uniform operation;" and in Section 21, Art. xxi, makes the declaration: "Nor shall any citizen or class of citizens be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." The language of these clauses, which limit the power of the Legislature, if we substitute the word "persons" for "citizens" in the last clause, would be the exact equivalent of the language of the Fourteenth Amendment to the Federal Constitution, which limits the power of the States. (*Brooks v. Hyde*, 37 Cal. 376-378; *Ward v. Flood*, 48 id. 50; *Guy v. Hermance*, 5 id. 74.)

If we were here assailing a legislative enactment making the discrimination in question, it would be clear that the enactment could not stand in the face of Sections 11 and 21 of Article i of the State Constitution.

In this case, the want of uniformity and equality in rights and privileges finds its source in the Constitution. It is the Constitution which gives to one person the right to appeal to a local Board and denies the right to another. It is the Constitution which makes the other discriminations of which the petitioner complains.

But this places the respondents in no better position, for if Sections 11 and 21 of Article i of the State Constitution would in themselves and standing alone deny the power to the Legislature, it must follow, as a logical result, that section 1 of Article xiv of the Federal Constitution, which is in substance the equivalent of the sections of the State Constitution cited, has no less effect than to deny the power to the State.

The discriminations complained of are: 1. A different manner of assessment; 2. Denial of appeal to local board; 3.

The proceedings in relation to the property here involved is without notice; and, 4. That none of the safeguards which the law throws around the assessment and valuation of other property are applied.

An assessment is of the very essence of taxation. (Burr-roughs on Taxation, 194; Cooley on Taxation, 244, 245, 259; Hilliard on Taxation, 290, 291.)

There must be uniformity in the mode of assessment as well as equality in the rate of taxation. (Cooley on Const. Lim., 3d ed., p. 622; *Knowlton v. Supervisors*, 9 Wisc. 410; *Pike v. The State*, 5 Ark. 206; *Exchange Bank v. Hines*, 3 Ohio St. 15; *People v. Whyler*, 41 Cal. 355.)

That there is no appeal to local boards of equalization has been determined by this Court. (*State Board of Equalization v. Sacramento Co.*, Cal.)

The provisions of the State Constitution which provide for the assessment of the property of railroad companies operating in two or more counties, if enforced, would deprive such companies of their property without due process of law.

Section 1 of Article xiv of the Federal Constitution declares: "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

"Nor (shall any State) deny to any person within its jurisdiction the equal protection of the laws."

This is the mandate of the Federal Constitution. Let us try the provisions of the Constitution of California, relating to revenue, by this supreme rule.

The owners of railroad property operated in more than one county are denied any protection from the laws, which, 1. Require that property shall be taxed in proportion to its value. 2. Require such proportions to be ascertained by a general law. 3. Require that, before liability is fixed, an opportunity to be heard must be given. 4. Give an appeal from the assessor to another tribunal. 5. Require the assessment to be made in the county, and prevent its being made in localities distant from the *situs* of the property; and, 6. Which prescribe the mode and manner of the assessment. Each of which laws goes to the very essence of the taxing power.

No such discriminations have ever been attempted in any State. It is true that in some States laws exist for the as-

certainment of the value of railroad property by tribunals differently constituted from the tribunals which ascertain the values of other property. But such tribunals have jurisdiction over all railroad property. They must proceed upon notice. The manner of their proceeding is regulated by laws analogous to the laws governing other tribunals exercising like powers—by laws which throw around the owners of such property every protection which the laws give to the owners of other kinds of property.

In *Ex parte Denis Kearney*, 55 Cal.212, the Supreme Court of California quotes with approval the language of Campbell, J., in *Jackson v. The People*, 9 Mich. 111, that "the Constitution, in apportioning the judicial power as well as in affirming the immunity of life, liberty, and property, has always been understood to guarantee to each citizen the right to have his title to property and other legal privileges determined by the general tribunals of the State." (*Stuart v. Palmer*, 74 N. Y. 191; *Ford's Case*, 6 Lans. 92; *Barhyte v. Shepherd*, 35 N. Y. 238; *Clark v. Norton*, 49 Id. 243; *Overing v. Foote*, 65 Id. 263; *Murray's Lessee v. Hoboken Land etc. Co.*, 18 How. (U. S.) 272.)

McKINSTRY, J.:

An application on *certiorari* to annul certain orders of respondent assessing the property of a railroad corporation. The following is a summary of petitioner's points:

1. Respondent had no power to make the assessment without first ascertaining the value of the property according to some law, order, or rule regulating its mode of action.

2. Sections 3664 and 3665 of the Political Code, as the same were adopted by the Legislature of 1880, are *void*, because the title thereto did not express their object; and, as amended in 1881, are void, because not passed by the constitutional majority.

3. The State Board has failed to comply (a) with Section 9 of Article xiii of the Constitution, which requires notice, etc. (b) Has failed, in this regard, to comply with Sections 3692 and 3693 of the Political Code. (c) If the Constitution of the State has attempted to confer the power on the State Board which it pretends to exercise, the provision of the

State Constitution is violative of the Constitution of the United States. (d) Also, of Subdivision 10 of Section 25, Article iv, of the State Constitution.

4. The "sworn statement" of petitioner is to be taken as true and correct, since it does not appear that any "general investigation" was had by the State Board, before the valuations in the petitions were increased.

5. The assessment of petitioner's "roadway" is void, because the roadway is not therein described by "metes and bounds."

6. Sections 3664 and 3665 of the Political Code are void in so far as they attempt to make the assessment by the State Board a basis of taxation for county purposes, city purposes, etc.

7. The order of the State Board is not an assessment for purposes of taxation, the assessment being for the year 1881, there being no such "fiscal" year, and no law declaring the valuation made for "1881" the basis of taxation for the thirty-third or thirty-fourth fiscal year.

8. The assessment is *void* because it blends the several items of property in one.

9. The assessment could only be equalized when petitioner applied to the Board, in the month of September.

10. The assessment is *void* because it attempts to assess the same property *thrice*, the roadway, roadbed, and rails being the same.

11. The assessment is *void*, because the record fails to show that it has been apportioned to the *cities, towns*, etc.

12. The Act of the Legislature which went into effect May 12, 1881, is *void*: First, because the object of the Act is not expressed in the title; second, it attempts to confer the power of levying a tax on the State Board of Equalization.

After consideration of the points made by counsel for petitioner, we say:

1. Had the Board power to proceed to the assessment without previous and independent ascertainment of the value under some law, order, or rule? In *People v. Supervisors of Sacramento County*, this Court said: "But it is the manifest intent of the Constitution that the valuation of the railroad property, mentioned in Section 10 of Article xiii, shall be

finally fixed and determined by the State Board of Equalization—the State Board has the exclusive power to assess and equalize its value. Thus the Constitution furnishes a system for the assessment of railroads, operated in more than one county, which is separate and distinct from that provided for the assessment of other property. The system is prescribed in Section 10 of Article xiii. ‘The franchises, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this State shall be *assessed* by the State Board of Equalization, *at their actual value*, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which said railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts.’ It can not be doubted (if the Constitution is constitutional) that the State Board of Equalization has power thus to assess the railroad property mentioned in Section 10 of Article xiii, and to apportion the same to the several counties, etc. The portion of the section quoted is clearly self-executing. We are at a loss to imagine how any statute could make the duty of the State Board any clearer than does this distinct and positive mandate of the Constitution. If any doubt could possibly be built upon the words cited it would be dispelled by the first clause of the same section. ‘All property, *except as hereinafter in this section provided*, shall be assessed *in* the county, city, city and county, town, township, or district in which it is situated *in the manner prescribed by law*.’ Thus by the very language of the Constitution all other but the railroad property mentioned must be assessed by the local assessors, in the manner prescribed by statute; the railroad property must be assessed in the manner prescribed by the sections of the Constitution.” (8 Pac. L. J. 103.) That is, by the State Board without the aid of statute.

2. Are sections 3664–3665 of the Political Code of none effect for the reasons stated in point two, as above stated? The title of the Act of 1880 (Amendments to the Codes, 1880, p. 5), must be held to be sufficient. It has been repeatedly assumed here, that, under the present Constitution, a title expressing the object of an Act to be “to amend Section ——”

of a named Code "relating to" the particular object treated of in the body of the Act, was a compliance with Section 24 of Article iv. The title of the Act now under consideration, shows that the sections added, are to be added to the *Political Code*, and relate to the object already mentioned. If, therefore, the attempt to amend Sections 3664-3665, in 1881, failed by reason of the amendment not receiving the necessary majority, the action of the State Board in assessing the petitioner's property may be upheld by the Act of 1880.

But the Board had the power under the *Constitution*. It may be admitted that the Legislature may prescribe their mode of procedure; limit the period in each year within which the Board can assess; determine how their records shall be kept; regulate their conduct to any extent which does not detract from their powers, nor relieve them of duties imposed by the Constitution. Under the Constitution no other officer or board can assess the property of railroads, operated in more than one county, and the State Board is commanded to assess it at its *actual value*. If the Legislature fails to regulate the mode, the power and duty is in the State Board of Equalization to assess at the actual value. It is of the *assessment* that petitioner complains. The Legislature can not relieve the railroad property of all taxation by neglecting to add further machinery to the sufficient direction which is found in the self-executing mandate of the Constitution.

3. In answer to the subdivisions of point three we say: (a) Section 9 of Article xiii, so far as it relates to the State Board, has reference to the equalization of assessments *between counties*. (b) The ninth subdivision of Section 3692 of the Political Code also refers to the equalization between counties; and Sections 3692 and 3693, if they attempt to provide for the equalization of individual assessments, are void. (*Wells, Fargo & Co. v. State Board of Equalization*, 56 Cal. 194.) (c) The particular provision of the Constitution of the United States claimed to be violated by the provision of the State Constitution is found in Section 1 of the Fourteenth Amendment: "No State shall deny to any person the equal protection of the laws." The Constitution of the State requires *all* property to be assessed at its actual value. We are unable to see how the fact that the value of one kind of

property is to be ascertained by one officer or Board and the value of another kind of property by another officer or Board—each clothed with the duty and responsibility of ascertaining the *actual* value—can be held to operate a deprivation of legal protection to the owners of either kind of property. The State Board in the one case, the Assessors and County Boards in the other, are but different instrumentalities through which the same result is reached; the fair and just valuation by reference to the same standard—and therefore the equal and uniform valuation—of property for purposes of taxation. (d) As to the proposition that Section 10 of Article xiii, conflicts with Subdivision 10 of Section 25 of Article iv without pausing to inquire which of the two provisions should be disregarded if they could not co-exist, it is enough to say that the section of the Constitution first mentioned is not “a local or special law” passed by the Legislature.

4. In support of the fourth point, as above stated, counsel relies upon Sections 3664 and 3693 of the Political Code. Section 3693 has reference to the equalization of assessments in counties. Section 3664 requires the President, or some officer of a corporation operating a railroad in more than one county, to furnish the State Board with a sworn statement of its property and values. It is added that if the corporation shall fail to furnish the statement, the State Board shall fix the value and proceed to assess the property of the corporation so failing, the valuation fixed by the Board to be final and conclusive. But the Constitution imposes the duty of *assessing* the property of the corporations upon the State Board of Equalization. The provision of the Code ought not to be construed, and can not fairly be construed, to make each railroad corporation the assessor of its own property, in case it chooses to file a statement. Doubtless the Board will place much reliance upon the statements, and will start with a presumption that they are correct, but if satisfied that property has been omitted from them by mistake, or that the valuation in them contained is too low, must perform its duty of assessing *all* of the property at its “actual value.” If the statement is not furnished, the valuation of the Board becomes “final and conclusive.” This is to be read in connection with the clause in the same section: “Any person dissatisfied with an assess-

ment made by said Board of Equalization against his or its property may, within five days after such assessment is made and entered of record on the books of said Board, by written petition, apply to said Board to have the same corrected in any particular." Where no "sworn statement" is filed, the corporation is cut off from its right to appeal to the Board, within five days, to have its first assessment corrected. And since it is only where a statement has been presented that the application can be made to have the assessment corrected, the assessment made by the Board, after the statement is furnished, is the one which may be corrected. It was certainly not the purpose of the statute to allow the corporation to complain of—and have corrected—its own sworn statement.

The foregoing, of course, is (as are the points of petitioner) based upon the assumption that the section of the Code is valid.

5. The description of the "roadway" is sufficient. The statute reads: "By metes and bounds, or *other* description sufficient for identification." Here the *termini*, courses, and distances are given. The law fixes the width.

6. In support of the sixth point, petitioner cites the Constitution (Art. xi, §§ 12, 13; Art. iv, § 25). Even if the Sections 3664 and 3665 were of none effect, so far as they make the assessment the basis of city and town taxation, the assessment before us would be valid. It is not necessary, in the present case, to decide whether Section 10 of Article xiii intends to make the assessment by the State Board of railroad property the assessment upon which the taxes in cities, etc., of such property, shall be collected for local purposes. If such is the proper interpretation of Section 10, Article xiii, it is to be read in connection with the other provisions. Each provision of the Constitution is to be given its proper effect. If in one section a power is specially conferred, or a duty specially enjoined, which, in general terms, is prohibited by other sections, the power or duty specially conferred or enjoined constitutes an exception to the general rule; the direction to employ the power or discharge the duty in the particular instance, is as mandatory as the general prohibition.

7. The tenth Section of Article xiii provides, that the railroad property shall be assessed by the State Board; the

Political Code, Section 3692, that the State Board shall assess such property *annually*, on or before the first Monday in March. The very notion of an assessment involves the fixing of values as of a certain date, since there is no mode of making the valuation vary with the increased or diminished value during the current year, and, if there were, such varying valuations would be destructive of established principles of uniformity. The annual valuation by the State Board, which precedes the fixing of the rate of taxation, applies to the rate which for State purposes is fixed for two years, and for county (city, etc.) purposes, perhaps, for a single year. The order of assessment made on or before the first Monday of March need not declare the particular fiscal year or years to which it is applicable. It is made applicable, by fair construction of the Constitution and Statutes, to the orders fixing the rate of taxation which next succeed it.

8. The order of assessment does assess separately the franchise, roadway, roadbed, rails, and rolling stock—the several subjects of taxation mentioned in the Constitution and Code. (Art. xiii, § 10; Pol. C., § 3692.) It is not necessary, therefore, to determine whether it is obligatory on the Board separately to specify the several items of railroad property. The Constitution does not, in terms, require that the assessed value of each item should be separately *apportioned* to the several counties; and that the Political Code does not contemplate such separate distribution is sufficiently apparent from Section 3650. That section provides that the Assessor shall prepare an assessment book, in which must be specified in separate columns, under appropriate heads: 1. The *names* of persons assessed; 2. Land by township, etc.; 3. City and town lots; 4. Personal property, showing number, kind, etc.; 5. Cash value of real estate, etc.; 6. Of personal property; 7. Money; 8. "The assessment of the *franchise, roadbed,*" etc., such as may have been made by the State Board and furnished to him; * * * 14. Total value of all property. It thus appears that while as to assessments made by the Assessor the kinds are to be separately stated, the assessment by the State Board of the "franchise, roadbed," etc., is entered in one column and as a single item.

9. It is true, that by Section 3664, the assessment of railroad property must be made (as in the case before us it was in fact made) on or before the first Monday of May. It is also true that by the same section the Board must meet on or before the third Monday of August to equalize the valuation of property as between the several counties. But a reconsideration of the assessment (or equalization) of railroad property can only be made by the State Board in case a petition shall be filed by a party interested, within *five days* after the assessment is made and entered.

10. "The roadbed is the foundation on which the superstructure of a railroad rests." (Webster.) The roadway is the right of way, which has been held to be property liable to taxation. (*Appeal of N. B. & M. R. R. Co.*, 32 Cal. 499.) The rails in place constitute the superstructure resting upon the roadbed.

11. Even if, as claimed, the assessment is not apportioned to cities, etc., the orders are nevertheless valid. The Constitution does not require that the apportionment to counties and to cities, etc., shall be one act. *Non constat*, but apportionment has been made to cities, towns, etc. The apportionment to a county is a single act, complete in itself.

12. The Act of May 12, 1881, is entitled "An Act to amend Section 3713 of the Political Code, and to provide for the *levy of the tax for State purposes for the thirty-third and thirty-fourth fiscal years.*" The title distinctly expresses the single object of the Act.

The Act does not attempt to confer the power of levying a tax upon the State Board. In *Houghton v. Austin*, 47 Cal. 646, it was held that Section 3666 of the Political Code, as the section read originally, in so far as it delegated to the State Board the power to fix the rate of taxation "after allowing for delinquency in the collection of taxes," was unconstitutional, because it was a delegation of legislative power. That section left it entirely in the hands of the Board to add any sum or percentage they might deem proper in anticipation of possible delinquencies. Such attempted delegation of legislative power is not found in the Act now under consideration. The Board is commanded to add twelve per centum, neither more nor less, for delinquencies. The twelve per

cent. is as definitely fixed as is any portion of the tax levied by the law-making power.

Orders affirmed.

Ross and McKee, JJ., concurred.

[No. 8,004.—Department One.]

Jan. 19, 1882.

THE CENTRAL PACIFIC RAILROAD COMPANY v.
THE STATE BOARD OF EQUALIZATION.

TAXATION—ASSESSMENT—RAILROAD COMPANIES—MORTGAGE—CONSTITUTIONAL LAW.—Under the Constitution of this State, the property of railroad and other quasi public corporations is subject to assessment and taxation, without deduction of the amount of any mortgage or like lien thereon.

ID.—ID.—ID.—ID.—ID.—This provision is not in conflict with the Fourteenth Amendment to the Constitution of the United States. The provision of that section, that no State shall "deny to any person within its jurisdiction the equal protection of the laws," applies to natural persons only, and does not apply to corporations, or artificial persons.

ID.—ID.—ID.—ID.—ID.—PERSON—DEFINITION.—Section 9 of Article xiii of the Constitution (relating to the equalization of county assessment rolls), has no relation to the assessments of the property of railroad corporations operated in more than one county.

ID.—ID.—ID.—FRANCHISE—CONSTITUTIONAL LAW.—The franchise of the Central Pacific Railroad Company is property subject to taxation; and is not exempt from taxation by reason of its being a means or instrumentality employed by Congress to carry into operation the powers of the general Government.

APPLICATION for writ of *certiorari*.

Creed Haymond, for Plaintiff.

The whole of the road within this State has, by the respondents, been assessed to the petitioner. This constitutes one of our objections to the actions of the State Board. The new Constitution of California, in language so clear and explicit that it admits of no question, declares, without exception, that "a mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of

assessment and taxation, be deemed and treated as an interest in the property affected thereby." (§ 4, Art. xiii.)

With the expediency of this provision the judicial department can not deal. The power which made it was alone competent to determine its wisdom. The Court, in the construction of the language, will not be at a loss. It would seem difficult to substitute words more intelligible or less liable to misconstruction. "A mortgage * * * shall, for the purposes of assessment and taxation, be treated as an interest in the property affected thereby." These are the words. Their purpose and object was to change (for the purpose of taxation) the familiar rule of law existing in this State that a mortgage should not be deemed and treated as an interest in the property affected thereby.

The "Pacific Railroad Act" (approved July 1, 1862), Section 5, declares that the issue and delivery of the bonds of the United States to the company "shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind and description."

Under the new Constitution there can be no doubt but this mortgage constitutes an interest in the property affected by it, and that to the extent of the debt secured by it the United States must, for the purposes of taxation, be treated as the owners of the road. The only answer which the Attorney General makes is that the road is properly assessed to the "holders of the legal title." The reply to this is that under the new Constitution the United States holds the legal title to the extent of the mortgage debt.

This interest is, by the State Constitution, exempted from taxation. Section 1, Article xiii, exempts all property which "may belong to the United States." It can neither be taxed, nor can the interest of the United States be affected by any action of the State. If it was competent to tax this interest, it would, of course, be competent to sell it for the tax. A sale for taxes followed by a deed, effectually destroys all prior liens upon the property. Hence, the reason and propriety of the exemption in question.

The mortgage to private parties also constituted, for the purposes of taxation, an interest in the mortgage property.

This interest has also been taxed to petitioner. There is no authority in law for such action. The concluding portion of Section 4, Article xiii of the State Constitution, provides a system for the taxation of the interests of mortgages, full and complete within itself, except as to "railroad and other *quasi* public corporations." As to these it is silent.

Nor are there any constitutional provisions which point out how the interest of mortgages of railroad property is to be taxed. The silence of the Constitution upon this subject is in effect its remission to the Legislature for action, and the Legislature has made no provision on the subject.

It is elementary that in the absence of law no valid tax can be made.

The Central Pacific Railroad Company is one of the means and instrumentalities selected and employed by Congress to carry into operation the powers granted to the general Government. A tax upon its franchise—upon its right to exist—is, within the meaning of all the authorities, a tax upon the means and instrumentalities of the general Government. Without the express consent of Congress, no State can impose such a tax.

On the first of July, 1862, Congress, in the exercise of powers that are not now questioned, passed "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes." (12 U. S. Stat. 489.)

The first section of the Act names a number of persons, and declares that they, "together with five Commissioners, to be appointed by the Secretary of the Interior, and all persons who shall be or may be associated with them and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the name, style, and title of the 'Union Pacific Railroad Company.'" The company thus created is vested with the usual and customary powers of a corporation. The corporation is then expressly authorized to construct and maintain a railroad and telegraph line upon a given line and between certain points named. The amount of the capital stock is next prescribed, and also certain rules and regulations for the government of the corpora-

tion, the management of its affairs, and the transaction of its business. Provision is also made for the election of a Board of Directors, and for the appointment of two additional directors by the President of the United States, to act as directors on the part of the Government.

The second section grants a right of way through the public lands, with the further right to take from the public lands, adjacent to the line of the road, materials of every description for the construction of the road, concluding with a promise on the part of the United States that the Indian titles to all lands falling under the operation of the Act shall be extinguished as rapidly as may be. The third section grants to the company alternate sections of land, on each side of said road, with certain reservations as to mineral lands and lands reserved, or otherwise disposed of, or to which pre-emption or homestead claims have attached. The fourth section provides, among other things, for the appointment of three Commissioners by the President, who are to examine the road, from time to time, and report to him as to the manner of its construction and the progress made therein, with a view to the issuing of patents for said lands, and that all vacancies occurring in said Board of Commissioners shall be filled by the President. The fifth section provides for the loaning of the credit of the Government, in the shape of bonds, and securing the payment thereof by a first lien upon the road and telegraph, together with all the rolling stock and other property, and concludes with a provision which has a most important bearing upon the question in hand, viz.: "And on the refusal or failure of said company to redeem said bonds, or any part of them, when required to do so by the Secretary of the Treasury, in accordance with the provisions of this Act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which, at the time of said default, shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury, for the use and benefit of the United States." This provision is followed by another contained in the sixth section, which provides: "That the grants aforesaid are made upon condition that

said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies and public stores upon said railroad for the Government, whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid." Power to consolidate with other companies named in the Act is given in the sixteenth section. The right to connect with the road is given to other companies by the fifteenth section. The President is authorized to establish a uniform width of track, so that the same cars can be run from the Missouri River to the Pacific Ocean, by the twelfth section.

The seventeenth section provides that if said company shall fail to comply with the terms and conditions of the Act, or to keep the road in repair and use for an unreasonable time, "Congress may pass any Act to insure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States," etc.; and further, that if said roads are not completed "so as to form a continuous line from the Missouri River to the navigable waters of the Sacramento River, by the first day of July, 1876, said roads, with all their rolling stock, fixtures, etc., shall be forfeited to and be taken possession of by the United States." The eighteenth section provides that when the net earnings of the road and telegraph shall have reached a certain per centum upon their cost, "Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law, and may at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this Act." Finally, by the last section, the company is required to make annual reports as to certain matters therein mentioned to the Secretary of the Treasury, for the obvious purpose of enabling the general Government to supervise and control the road and telegraph by legislation and otherwise. (12 U. S. Stat. at Large, 489.)

In respect to this question of taxation, the Pacific Railroad

Acts are upon all fours with the Act by which the Bank of the United States was established (3 U. S. Stat. at Large, 266). The plan adopted by Congress for the purpose of establishing the bank and securing its use to the Government, as a financial agent, is so similar to that adopted in the present case, as to suggest that the former served as a model for the latter. As in this instance, a corporation, with full banking powers, was created. The amount of its capital stock was fixed at thirty-five millions of dollars, of which sum the Government was to subscribe only one fifth, or seven millions, leaving twenty-eight millions to be taken by private individuals. The affairs of the bank were to be managed by twenty-five Directors, of whom twenty were to be elected by the stockholders and five to be appointed by the President of the United States, by and with the advice and consent of the Senate. The powers of the Directors and the business operations of the institution were defined and restricted. Power was given, with certain restrictions, to establish branch institutions in the several States. The Secretary of the Treasury was authorized to call upon the bank for a statement of its affairs, as often as once a week. For the privileges and benefits conferred by the charter, the President and Directors of the bank were required to pay to the United States a bonus of one million and five hundred thousand dollars, in three equal payments. And it was lastly provided that the books of the corporation should always be open to the inspection of a committee of either House of Congress, appointed for that purpose.

Contrast these provisions with those of the Railroad Act, to which reference has been made, and it will appear that the interest of the Government in the bank was much less, and the powers over its management and affairs assumed by the Government was much less sovereign than in the case of the Pacific Railroad. The interest of the Government in the bank was but five millions of dollars; to the Pacific Railroad and telegraph it has loaned sixty-three millions in bonds, and has donated thirty millions more in land. As the Government shared in the management of the bank, through directors appointed by the President, so does it share in the management of the Union Pacific, through the same means. As the Gov-

ernment was authorized to watch the operations of the bank through committees of Congress, and reports by the directors of the bank to the Secretary of the Treasury, so has it watched the construction of the railroad and telegraph, through Commissioners appointed by the President, and so has it, and does it, inspect the management and affairs of the Pacific Railroad and telegraph, through annual reports made by the directors for a time, to the Secretary of the Treasury, but latterly to the Secretary of the Interior. As the Government reserved the power to control the loans and business operations of the bank, by legislation, so has it reserved the right to fix and establish by law, fares and freights upon the Pacific Railroad. The sovereignty asserted over the bank was therefore in no respect greater than that asserted over the railroad; on the contrary, the sovereignty asserted over the railroad is far greater, in a most important particular. Nowhere in the Act by which the bank was established, was any provision made for the forfeiture of its franchises, or for taking possession of its property by the Government and administering its affairs through other agencies, or the devotion of its income and resources to the use of the United States. Yet all of these Acts, which lie upon the extreme verge of sovereign power, have been reserved by the Government in the case of the Pacific Railroad and telegraph.

It is clear that the Union Pacific Railroad Company is a national corporation, created for the benefit and use of the general Government, in the conduct and management of its postal, military, and other affairs. The relation of the Central Pacific to the general Government differs from that of the Union Pacific in one respect only. The Central Pacific was not in the first instance created a corporation by the general Government. It had become a corporation, under the laws of the State of California, prior to the passage of the Pacific Railroad Act.

By the Act of 1862, Congress conferred the same powers upon the Central Pacific which it conferred upon the Union Pacific, annexing thereto the same conditions. In the ninth section of the Act it is provided that: "The Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, are hereby authorized to

construct a railroad and telegraph line from the Pacific Coast, at or near San Francisco, or the navigable waters of the Sacramento, to the eastern boundary of California, upon the terms and conditions, in all respects, as are contained in this Act, for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California."

"Again, in the tenth section, it is further provided: "And the Central Pacific Railroad Company of California, after completing its road across the State, is authorized to continue the construction of said railroad and telegraph through the territories of the United States to the Missouri river, including the branch roads specified in this Act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this Act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole of said railroad and branches and telegraph is completed."

In Section 16 of the Act of Congress of July 2, 1864, it was provided that upon complying with certain conditions (all of which have been complied with), the Central Pacific Railroad Company "shall enjoy all the rights, privileges, and benefits conferred by this Act upon the Union Pacific Railroad Company."

It has been claimed on behalf of the Central Pacific Railroad Company—and with great plausibility—that by reason of the Acts of Congress relating to it, the general Government has converted it into a national corporation, and that in form as well as substance, it bears the same relation to the Federal Government, and to the States, as does the Union Pacific Company. It is also claimed that the State of California has assented to the adoption. That Congress intended to and supposed it had erected the Central Pacific Railroad Company into a national corporation is evident. Section 17 of the Act of 1862 provides in direct terms for a forfeiture to the United States for non-performance of conditions, of the property and franchises of that corporation. "Conditions can only be reserved to the feoffer, donor, or lessor and their heirs; but not to a stranger." It would not be competent for Congress to

provide for the forfeiture of the franchises of a State corporation to the national government for non-performance of conditions, nor to provide for the entry of the United States for such conditions broken, for "he who enters for conditions broken shall be in of the same estate he was before." (*Wise-man v. McNulty*, 25 Cal. 239.)

But whether it be true or not that the Central Pacific Railroad Company has in form been made a federal corporation, I shall not stop to inquire. The question whether it is or is not a federal corporation is of minor importance. Corporation or no corporation is not a factor in the solution of the problem.

The exemption is not claimed upon the ground that it is a federal corporation, but upon the ground that by the unquestioned Act of Congress it has been selected as a means and instrument of the general Government to carry into execution the admitted powers of that Government. It was authorized to construct and operate a railroad and telegraph line upon the same "terms and conditions in all respects" as the Union Pacific.

These "terms and conditions" constitute the tests whether or not it has been made an instrument of the general Government. It is useless, at this point, to speculate upon the reasons which led to the enactment of the law of 1862, or what were the purposes had in view; for Congress has declared the reason and purpose in the title of the Act to be to "secure to the Government the use" of a railroad from the Missouri River to the Pacific Ocean "for postal, military, and other purposes." To effectuate that purpose, Congress created a corporation known as the Union Pacific Railroad Company, and adopted the Central Pacific Railroad Company, and to these corporations, upon the same terms and conditions, intrusted the execution of its purposes. The two companies were charged by Congress with the speedy construction of the road and telegraph line. It was made their duty, when completed, to keep the same in repair and use, so that upon demand of the Government they could transmit its dispatches over the telegraph line and transport its mails, troops, munitions of war, supplies and public stores upon the railroad. To the end that these companies might be in con-

dition to perform these great governmental functions, aids in lands and bonds were granted; and that they might maintain and operate the vast machine intrusted to their care and be ready at all times to give to the Government its aid in peace and in war, without too great a charge upon the public treasury, they were authorized to transact business for private parties, but were required at all times to subordinate such business to the public duties cast upon them. The Government "must at all times have the preference." At all times both companies are subject to the orders of the general Government, and must, at its command, devote themselves to the performance of their governmental functions to the absolute exclusion of all other business. Not more absolute is the control of the general Government over the officer who commands its steam frigates, than is its control over the agents who constructed and who manage the transcontinental roads. It may, for the purposes of his creation, control every public and official action of a captain in the navy. All this it may do with these corporations, and even more, for it may control their relations with private parties and regulate the terms and conditions upon which they can transact their private affairs. Congress has employed these corporations as a means to carry its powers into execution. Can the State Governments destroy either? This is the question, upon the solution of which depends the validity or invalidity of the State tax sought to be imposed upon the franchise, or the right to exist, of the Central Pacific Railroad Company.

The power to create implies the power to preserve. The power to destroy, if wielded by a different hand, is hostile to and incompatible with the power to create and preserve. Where that repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme. "These propositions as abstract truths," says Chief Justice Marshall (*McCulloch v. Maryland*, 4 Wheat. 426), "would, perhaps, never be controverted."

Are these propositions applicable to the case in hand? Let us consider them separately, and in the order of inquiry the first will be: Had Congress the power to select the Central Pacific Railroad Company and create it an agent of the general Government—to make it one of the means or instru-

ments for the construction of a transcontinental railway and telegraph, and one of the means or instrumentalities by which the use of the same for postal, military, and other purposes could be secured to the Government?

At this late date no argument would seem to be necessary to maintain that Congress possessed such powers. The Federal Constitution expressly confers upon Congress the power among others to provide for the common defense and general welfare of the United States; to establish postroads; to declare and carry on war; and to make all laws which shall be necessary and proper for carrying into execution the powers granted. With respect to the means by which the powers it confers are to be executed, the Constitution has been construed to allow to Congress that discretion which will enable it to perform the high duties assigned in the manner most beneficial. After Congress has acted it is not for the Courts to determine whether the means selected are the best possible. Such considerations are for Congress alone. If the end be legitimate; if it be within the scope of the Constitution, then all means which are plainly adapted to that end, whether better ones could be found or not, may be constitutionally used by Congress. (*McCulloch v. Maryland*, 4 Wheat. 421.)

We have seen that the declared purpose of Congress in providing for the construction of the transcontinental railway and telegraph was to "promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war), the use and benefits of the same for postal, military, and other purposes." Was the end a legitimate one? Was it within the scope of the Constitution? In the progress of science railways have become mighty engines in the prosecution of military enterprises. Indeed, their use may be said to have almost revolutionized the art of war. Not only are they proper means if the end be war, but they are admittedly necessary means, without which no civilized nation would attempt to carry on warfare with another. This being so, then Congress would have the right to construct and to maintain them to subserve the public welfare. The power to construct and maintain necessarily includes the power to

determine the mode and means of construction and maintenance, and to select the instruments to keep the same in working order. In making this determination, Congress created a corporation to construct and maintain the eastern section, and adopted a corporation already in existence to construct and maintain the western section. As to both sections the object of Congress was the same. To authorize some person to construct the road and to impose upon the persons authorized the duty of keeping it in repair and use, so that, whenever required, the "mails, troops, and munitions of war" of the government could be transported over it, and, if necessary, to the exclusion of all other traffic. This was the great purpose and object of the Government, and in this purpose and object Congress found the constitutional authority to act in the premises. The end was not to create one corporation nor to adopt another, but was to create agents, or instrumentalities and means through which the governmental function involved could be exercised. It created one corporation, and made of it such an instrument of its power. It found another corporation in existence and made it the means by which the power should, in part, be executed. Congress seized upon a State corporation and made it the instrument to execute its will. Congress, by law, gave it the right of way over the public lands; the right to contract debts and secure them by mortgage; the right to take and hold property; the right to build railroads in the Territories of the United States; the right to make contracts; the right to maintain ferries over navigable waters; the right to eminent domain; the right to consolidate with other corporations, and to adopt and use thereafter a corporate name, and to enjoy all the rights, privileges, and benefits conferred upon the Union Pacific.

Congress, by law, made it the duty of the Central Pacific Railroad Company to keep the road and telegraph in repair and use; to transmit, on demand, dispatches, mails, troops, and munitions of war for the Government, and reserved the right to regulate freights and fares—to enter for condition broken, and to alter, amend, and repeal. These rights, privileges, powers, and duties, conferred and imposed, make the instrument to bear a wonderful resemblance to a federal cor-

poration. In these times Courts deal more with substance and less with form in construing laws, and when we remember that no particular form of words or mode of expression is necessary to the creation of a corporation, it is difficult to conceive that Congress intended less than the creation of a federal corporation. But it is not the name which the instrument bears, but the faculties with which it is endowed and the purposes for which it is used, which gives it immunity. All the rights and privileges above enumerated, all the rights and privileges which the Union Pacific enjoy, are conferred upon the Central Pacific by the laws of the Federal Government. That the Central Pacific Railroad Company is an agent of the Government precisely as the Union Pacific Company is, to the same extent, and for the same purposes, is not an open question. Such is the judgment of the Supreme Court of the United States. (*Railroad Company v. Peniston*, 18 Wall. 32.)

No one has ever seriously questioned the power of Congress to enact the laws in question, and we may safely assume that Congress, "to promote the public interest and welfare, * * * to secure to the Government at all times, the use and benefit of the transcontinental road and telegraph," had the right to select the Central Pacific Railroad Company as an instrument, clothe it with the privileges and immunities given by law, and place it in charge of the western section of that road and telegraph line. Can the State destroy this agent? No one would have the temerity to contend that a State could repeal the laws which confer upon the Central Pacific its character as a national agent. Whatever Congress has the power to do the individual States have no right to undo. Its power to select an agent and place it in charge of the machinery of war, like its other sovereign powers, is supreme, or it would be nothing. As Mr. Pinckney aptly remarks (*McCulloch v. Maryland*, 4 Wheat. 391): "A power to build up what another may pull down at pleasure is a power which can provoke a smile, but which can do nothing else." If the State can not repeal the Acts of Congress under which this corporation now exercises all its functions, it can not by indirection accomplish the same purpose. This agent chosen by the Federal Government must continue to exist, enjoy its priv-

ileges and immunities, and perform its obligations so long as that Government wills. A constitutional law enacted by Congress to carry into execution the powers vested in the general Government confers the privileges and immunities, and imposes the obligations, and no State can in any manner retard, impede, burden, or control the operation of that law. (*McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. Bank of United States*, 9 Id. 738; *Weston v. City of Charleston*, 2 Pet. 466.) This, says Chief Justice Marshall (*McCulloch v. Maryland*, 4 Wheat. 436), is "the unavoidable consequence of that supremacy which the Constitution has declared." And again (p. 425): "A law absolutely repugnant to another, as entirely repeals that other as if express terms of repeal were used."

The power of the State to tax the franchise—the right to exist—of the Central Pacific Railroad Company is incompatible with the power of the Federal Government to adopt and use it as a governmental agent or instrument.

The transcontinental road, dedicated now chiefly to the promotion of the arts of peace, was born in war. It is true that a few of the prominent men of the nation had long looked forward to such a work; and that the people of California, forming an isolated community, had as early as May 1, 1852, through their Legislature, declared "that the interests of this State, as well as those of the whole Union, require the immediate action of the Government of the United States for the construction of a national thoroughfare connecting the navigable waters of the Atlantic and Pacific Oceans, for the purposes of national safety in the event of war, and to promote the highest commercial interests of the Republic," and granted the right of way through the State to the United States for the purpose of constructing such a road. (Stats. Cal., 1852, p. 150.) Again, in 1859, the Legislature passed a resolution calling a convention "to consider the refusal of Congress to take efficient measures for the construction of a railroad from the Atlantic States to the Pacific, and to adopt measures whereby the building of said railroad can be accomplished" (Stats. Cal., 1859, p. 391.) And at the same session the Legislature memorialized Congress to pass a law authorizing the construction of such a road, and asking that lands be granted in aid thereof. (Stats. 1859, p. 395.)

These various measures of the State of California are referred to to show that in the judgment of the State the work was a proper one for the Federal Government, and national in its character. But nothing came of these acts and resolves. It was only when war, in fact, was at hand, that the National Government moved in the premises.

We have seen that the State of California had uniformly characterized the work as a national one. That Congress declared the purpose of the Act of 1862 to be "to promote the public welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefit of the same for postal and military and other purposes." (§ 18, Act of 1862.) Here, then, we have the declaration of the legislative department of both State and Federal Government, that the paramount purpose of the road is a national one; and that the means by which it was to be constructed and used were national means. We come now to consider how the judicial department of the Federal Government has construed the Pacific Railroad Acts, and what that department has said upon the question—whether the transcontinental road is a national machine, and the persons in charge of it agents of the Federal Government, to carry into execution its lawful purposes—whether or not such persons have been selected by the general Government as means to the ends sought to be attained by the Pacific Railroad Acts. (*United States v. Union Pacific R. R. Co.*, 91 U. S. 79.)

The object was "protection to the people" of the Pacific Coast. The road was viewed as "a national undertaking for a national purpose." It was a "military necessity." The project "was not conceived for private ends." It "originated in national necessities." "Profit to individuals" was contemplated, "but this consideration does not in itself change the relation of the parties." The "primary object of the Government was to advance its own interests." Individual co-operation was an incident—"a means to an end." That end "the securing of a road which could be used for national purposes." The Central Pacific Railroad Company was one of the "means" which Congress selected to secure the end.

Congress charged it with the construction and maintenance of the road, gave it command of a national instrument, and the question now is: Does that corporation, in the economy of government, rank with and enjoy the immunities of the Captain of a revenue cutter "on the Erie Station"?

The Union Pacific Railway Company, Eastern Division, is the corporation mentioned in Section 9 of the Railroad Act of 1862, as the "Leavenworth, Pawnee, and Western Railroad Company of Kansas." It was chartered by the Legislature of the Territory of Kansas, and subsequently by the State of Kansas. The Pacific Railroad Act of 1862 constituted it one of the companies which, in connection with the Union Pacific and Central Pacific, was to construct and maintain the trans-continental road. To the Union Pacific Railroad, chartered by Congress, it bears the same relation as the Central Pacific, with this exception, that the provisions in the Act of 1864, Section 16, which provides that the Central Pacific Railroad Company shall "enjoy all the rights, privileges, and benefits conferred by this Act upon the said Union Pacific Railroad Company," had no application to the Kansas Company. After the road was completed through the State of Kansas, the Legislature passed a law, laying certain taxes upon the tangible property of the company within the jurisdiction of the State. The payment of these taxes was resisted by the company, upon the ground that it was an agent of the general Government, and that a tax upon its property would retard, impede, burden, and control the company in the discharge of its duties and obligations to the Federal Government. The issue thus made came before the Supreme Court of the United States for determination in *Thomson v. The Pacific R. R.* (9 Wall. 579). The question for determination, as stated by the Court, was: "Can the right of this road to exemption from such taxation (*i. e.*, upon its tangible property) be maintained, in the absence of any legislation by Congress to that effect?" (p. 589.) The Court, after reviewing the various cases bearing upon the question, say: "We fully recognize the soundness of the doctrine that no State has a right to tax the means employed by the Government of the Union for the execution of its powers, but we think there is a clear distinction between a means employed by the

Government, and the property of agents employed by the Government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always nor generally taxation of the means." (p. 691.) And in the case then in judgment, the Court determined that the tax levied by the State of Kansas being upon the property, and not upon the agency itself, was not within the immunity, and the Act of the Legislature of the State of Kansas was constitutional, and could be enforced. Some expressions in the opinion delivered by the Chief Justice in the case just cited, led to the belief that the Court might maintain that there was a distinction between the property of the agent, if that agent was a State corporation, and the property of the agent, when that agent was a Federal corporation.

But in the case of *The Railroad Company v. Peniston*, 18 Wall. 5, it was held that no such distinction existed, and that the question was not whether it was a Federal or State corporation, but that the immunity rested upon the fact that the person or corporation claiming it had been selected by the general Government as an agent in the execution of its powers. In that case the tax involved was one laid by the State of Nebraska upon the tangible property of the Union Pacific Railroad Company, a corporation created by Congress. The Court in its opinion refers to the case of *Thomson v. Union Pacific R. R. Co.*, 9 Wall. 579, and says: "It is true that in the opinion delivered by the Chief Justice, reference was made to the fact that the defendants were a State corporation, and an argument was attempted to be drawn from this to distinguish the case from *McCulloch v. The State of Maryland*" (p. 436). "But," says the Court, "when the case is as in the present case, whether the taxation of property is a taxation of means, instruments, or agencies by which the United States carries out its powers, it is impossible to see how it can be pertinent to inquire whence the property originated, or from whom its present owners obtained it. The United States have no more ownership of the road authorized by Congress than they have in the road authorized by Kansas. If the taxation of either is unlawful, it is because the State can not obstruct the exercise of national powers" (p. 34). "There is no difference which can be pointed out between the nature, extent, or pur-

poses of their agency and those of the corporation complainants in this particular case" (p. 33).

"As was said in *Weston v. Charleston* (2 Pet. 466), they (the States) can not by taxation or otherwise, retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general Government. The implied inhibition, if any exists, is against such obstruction, and that must be the same, whether the corporation whose property is taxed was created by Congress or by a State Legislature."

Reference is then made by the Court to the fact that in *McCulloch v. Maryland* (4 Wheat. 436), the tax was upon the operation of the agent; that in the case of *Osborn v. The Bank of the United States* (9 id. 738), the tax was upon its right to transact business, and that a clear distinction was taken between the right of a State to tax the operation or existence of the agent, and a right to tax its tangible property within the jurisdiction of the State, and this distinction, says the Court, "so clearly drawn in the earlier decisions between a tax on the property of a governmental agent and a tax upon the operation of such agent, or upon his right to be, has ever since been recognized" (p. 36).

The cases last cited are in harmony with the earlier decisions, and also with the principle laid down in the case of the *Collector v. Day*, 11 Wall. 127.

In no subsequent case has the force of their reasoning or the weight of the authority of the cases of *McCulloch v. Maryland*, and *Osborn v. The Bank of the United States*, been in the least abated, but on the contrary the principles established in those cases stand unbroken and impregnable.

In the *Railroad Company v. Peniston* (18 Wall. 5), the Supreme Court by the clearest implication, maintain that if the tax complained of in *Thomson v. U. P. R. R. Co.*, or the *Railroad Company v. Peniston*, had been imposed upon the franchise—the right of the company to exist—it would have been not a tax within the province of the State Government to impose, but one prohibited by the Constitution of the United States. While upon this question the Court is unanimous, a majority determined that the tangible property of the companies, parties to those suits, was not within the

immunity claimed, but the Court divided nearly evenly, the minority holding that the exemption extended not only to the existence and being of the agent, but to all of its property within the States.

We have in this argument treated the Central Pacific Railroad Company as a corporation deriving its powers from the State alone. This is not true in point of fact; so far as it was organized under State laws it was with a capital of eight million five hundred thousand dollars, and to build a road from Sacramento City to the eastern boundary of California, a distance of one hundred and fifteen miles. Under the operation of its California charter it could only borrow money to an amount not exceeding its capital stock, and must provide a sinking fund for the ultimate redemption of its bonds. The State granted no power to build any road except from Sacramento to the State line. By the Railroad Act of 1862 Congress granted it the right to build a road and telegraph line from San Francisco to the eastern boundary line of the State, and thence through the territories of the United States until it met the road and telegraph line of the Union Pacific Company, and gave to it other privileges and immunities of a corporate character, which have been heretofore enumerated. In the Sinking Fund cases (99 U. S. 727, 728, 729), the Supreme Court of the United States, referring to the Central Pacific Railroad Company, expressly determine that these things were "additions" to the corporate power of the company, and say that "but for the corporate powers and financial aid granted by Congress, it is not probable the road would have been built." It was in this grant of corporate powers, franchises, and immunities by Congress that the Court rested the authority of Congress to enact the "Thurman Bill" into a law.

If this Court should hold that the immunity from taxation is in any degree dependent upon the source from which the corporate powers emanated, we have in the "Sinking Fund cases" the authoritative announcement of the Supreme Court of the United States that the franchise of the Central Pacific Railroad Company in part finds its source in Congressional enactment, and that to the extent of the powers so conferred the franchise is a Federal franchise. This alone would render

any scheme of State taxation of the franchise impracticable. How is that part of the franchise granted by the State to be segregated from that part granted by the general Government? Which part of the life of this being is at the mercy of the State? Upon which member of its body may the State Tax Collector execute his judgment of death? These would be pertinent questions if an attempt in this view of the case had been made to assess and tax part of the franchise of the company. But no such attempt has been made. The paltry considerations of "mine and thine" have not agitated the State Board of Equalization, but with characteristic audacity it has seized upon the whole.

The attempt of the State of California to levy a tax upon the existence of an agent of the National Government is a clear case of usurpation—an open defiance of the supremacy of the Federal Government as maintained in every adjudication made by the Supreme Court of the United States upon the subject.

A. L. Hart, Attorney General, for Respondent.

Petitioner was not entitled to have any reduction on account of the existence of the mortgage against its road. The Constitution provides a different mode in making assessment of railroad property incumbered by mortgage than of other property so incumbered. It is provided that "except as to railroad and other *quasi* public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district, in which the property affected thereby is situate." (Art. xiii, § 4.) The above provision seems too plain to admit of construction. If in all cases "except as to railroads," etc., a deduction of the value of the security is to be made, it follows from an elementary rule of construction that, as to the exceptions made, no such deduction is to be allowed; or, in other words, in the case of a railroad, the entire value is to be assessed against the owner of the road, regardless of the question whether or not a mortgage or like incumbrance exists against

the road. "All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law." (Art. xiii, Section 1.) If the railroad of petitioner is to be taxed at its value, as provided in Section 1, and if the incumbrance existing against said railroad is not to be assessed to the owner of the security, the unavoidable inference follows: that the entire value of the railroad is to be assessed against the owner—the holder of the legal title to the road.

The power to make the said assessment, and to apportion the same, is clearly conferred upon the State Board of Equalization by Section 10 of Article xiii of the State Constitution, and that section is self-executing. (*People v. Supervisors of Sacramento County*, 8 P. C. L. J. 103.)

It is argued by petitioner, however, that the foregoing provision of the Constitution is in conflict with the Constitution of the United States, because, as is alleged by petitioner, no provision is made permitting the owner of a railroad, operated in more than one county, to obtain a reduction or equalization of its assessment by the local Boards of Equalization; that the railroad company is thus denied a privilege accorded to the owners of every other kind of property; and in support of this position, reliance is placed by petitioner upon that portion of Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides that "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

The vice of this argument is, that it is based upon the assumption that no provision is made in the Constitution for the equalization of assessments made by the State Board of Equalization, when in fact such provision is clearly and unquestionably made.

Section 9, of Article xiii, provides that the "State and County Boards of Equalization are hereby authorized and empowered, under such rules of notice as the County Boards may prescribe as to the county assessments, and under such rules of notice as the State Board may prescribe as to the action of the State Board, to increase or lower the entire assessment roll, or any assessment contained therein."

In assessing railroad property the State Board of Equaliza-

tion acts primarily, not as an equalizing, but as an assessing Board. The object of the framers of the Constitution, as clearly evidenced by Section 10 of Article xiii, was to provide a means of ascertaining the value of a railroad, as such, and taken as a whole, without being put to the necessity of assessing the value of its several parts or elements. Where the road is located entirely in one county, such a valuation may be made by the local authorities; but wherever the road runs through more than one county, some portion of the property extending beyond the local jurisdiction of the authorities of either of the counties through which it runs, the assessment, in order that it may cover the value as an entirety, must of necessity be made by the State Board, whose jurisdiction extends throughout all the counties. The reason for desiring the assessment of the value of the road as a whole is obvious. Railroads, like all other property, possess a value for the purposes for which they may be used, and for none other; railroads are valuable for purposes of transportation, and in proportion to the profits which they are capable of producing. The value of such property is but slightly affected by the character of the land over which the roads run, or by the nature of the materials out of which they are constructed. The value of such property may be, and ordinarily is, determined by its location and its surroundings—by the amount of carrying trade it receives on account of the settled condition and population of the country to, from, and through which it runs. A part of a valuable road, if isolated from the balance, might possess no value.

The primary object of the framers of the Constitution was to arrive at the true value of the property of such railroads in each county; the means adopted was first to ascertain the whole value of the road, and then to divide or apportion the said value among all the counties in proportion to the number of miles of railroad in each county. By the method thus adopted the value of the railroad in each county is assessed for purposes of taxation, and this valuation, together with a proper description of the property, is entered upon the assessment roll of the county. (Pol. C., § 3664.)

The only difference between the assessment of this and of other kinds of property, that can be found in the Consti-

tution, is, that the value of the one is primarily determined by the State Board of Equalization, while the other is assessed by the County Assessors and other local authorities. All the assessments so made may be eventually equalized by the State Board of Equalization. Assessments of railroads, as of all other kinds of property, go upon the county assessment roll for the purposes of State and county taxation.

The language of Section 9 of Article xiii, conferring upon the Boards of Equalization the power to equalize by raising or lowering the "entire assessment roll, or any assessment contained therein," is sufficient, therefore, to cover assessments of the character herein complained of. Plainer or less ambiguous language could not have been used to express the will of the people; and in whatever manner the powers conferred by that section may be distributed, it can not be denied that the sum total of all the powers possessed by both the Boards extend to the equalization of all kinds and classes of property, whether it belong to persons or to corporations. The object of the provision was to give to all property owners an opportunity to be heard as to the justice of the assessments made upon their property. The language of the section is such as to confer upon the several Boards general powers in matters relating to equalization. The rule established is a just and equitable one, and it is respectfully insisted that the Court should not, by mere construction or implication, place upon powers a limitation which must result in inequality or injustice.

The two Boards of Equalization, according to the language of the Constitution, have the power to equalize all assessments in the roll; and it is a rule, that when the language of the Constitution is unambiguous, no construction should be given to it which is opposed to the express words of the instrument. (*Bourland v. Hildreth*, 26 Cal. 161; *French v. Teschemaker*, 24 id. 518.)

The provision of the Fourteenth Amendment, relied on, that no State shall deny to any person the equal protection of its laws, is, we claim, only to be applied to the ultimate result to be attained, not to the method of procedure by which such result is arrived at. When applied to the case under discussion, it can not well be said that the State Constitution

denies to petitioner the equal protection of the law, if, in fact, a system is provided by which a fair and equitable assessment for the purposes of taxation is made of the property of petitioner, as compared with other property in the State.

It results that the State Board had the power, under the Constitution, to assess the property of the petitioner, and any error committed by that Board, whether of law or of fact, was committed in the exercise of an exclusive jurisdiction conferred by the organic law.

McKINSTRY, J.:

In addition to the points made in *San Francisco and North Pacific Railroad Company v. The State Board of Equalization*, the petitioner makes the following: 1. The whole of the road within this State has, by respondent, been assessed to petitioner; 2. The State Board, in making the assessment and apportionment, did not pursue the authority conferred by the State Constitution; 3. The Central Pacific Railroad is one of the means and instrumentalities employed by Congress to carry into operation the powers granted to the general Government. A tax upon its franchise—upon its right to exist—is, within the meaning of all the authorities, a tax upon the means and instrumentalities of the general Government. Without the express consent of Congress, no State can impose such a tax.

1. It is said that the Board had power only to assess the value of the real property of petitioner, less the amount of bonds issued to the company, which, by the "Railroad Act" of July 1, 1862, it is declared "shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures, and property."

The State Constitution declares: "A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby." (§ 4, Art. xiii.) But the same section proceeds: "*Except* as to railroad and other *quasi* public corporations, in case of debts so secured, the value of the property affected by each mortgage, deed of trust, contract, or obligation, less the value

of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate."

Reading the whole section it seems very plain that as to mortgages, deeds of trust, contracts, or other obligations secured upon the property of railroad and other *quasi* public corporations, they should not be deemed and treated as an interest in the property affected by them "for the purposes of taxation."

Under the Constitution of this State the property of such corporations is subject to assessment and taxation, without deduction of the amount of any mortgage or like lien thereon. The meaning is made clearer by the language "shall be assessed and taxed in the county, city, or district" in which the property is situate. By reason of Section 10, Article xiii, the property of railroads "operated in more than one county" *can not* be assessed in the counties, but *must* be assessed only by the State Board of Equalization.

The claim is, that thus to impose upon railroad corporations, operated in more than one county, a tax upon the full value of their property, while upon owners of other property is imposed a tax only upon the value of their property after deducting the amount of mortgage and other like liens, is to deny to such corporations the "equal protection of the laws," and therefore violative of the Fourteenth Amendment to the Constitution of the United States.

It may be urged that there is no practicable difference between taxing the railroad corporations at a higher rate or percentage upon the value of their property than is assessed upon the property of others, and establishing a mode of estimating the value of their property which results in the payment by them of more than is paid upon like property by others. But, if this be true, are the provisions of the State Constitution in conflict with the Fourteenth Amendment of the Constitution of the United States?

"The power to tax is the strongest and most pervading of all the powers of government." (Miller, J., in *Loan Association v. Topeka*, 20 Wall. 655.) No limitations or restrictions upon this essential attribute of government can be raised by

implication; but the intention to limit or abridge it must be expressed in clear and unambiguous language. (*Lane County v. Oregon*, 7 Wall. 71; *Munn v. Illinois*, 94 U. S. 123.)

In *The Insurance Company v. The City of New Orleans*, it was held that an ordinance which levied a tax upon foreign corporations double that levied upon domestic corporations was not in conflict with the Fourteenth Amendment. The United States Circuit Judge said: "Are corporations within the meaning of the amendment? The word *person* occurs three times in the first section, in the following connections: 'All *persons* born or naturalized in the United States,' 'nor shall any State deprive any *person* of life, liberty, or property,' etc.; 'nor' shall any State 'deny to any *person* the equal protection of the laws.' The complainants claim that this last clause applies to corporations—artificial persons.

"Only natural persons can be born or naturalized; only natural persons can be deprived of life or liberty; so that it is clear that artificial persons are excluded from the provisions of the first two clauses just quoted. If we adopt the construction claimed by complainants, we must hold that the word 'person,' when it occurs the third time in this section, has a wider and more comprehensive meaning than in the other clauses of the section where it occurs. This would be a construction for which we find no warrant in the rules of interpretation. The plain and evident meaning of the section is, that the persons to whom the equal protection of the law is secured are persons born or naturalized or endowed with life and liberty, and consequently natural, not artificial persons." (1 Wood, 85.)

2. The State Board of Equalization performs its function, with reference to the property of railroad corporations, by making the assessments of all such properties accord with the standard of "actual value." Section 9, of Article xiii of the Constitution has no relation to the assessments of the property of railroad corporations, operated in more than one county. (§ 10, Art. xiii.)

3. The petitioner derives its franchise, "its right to exist," solely from and under the laws of the State. When it ceases to exercise all the privileges thus derived (assuming that it may, of its own option, abandon them, and, at the

same time, relieve itself of the duties and obligations necessarily joined with them), it may, perhaps, be in a position to contest the right of the State to tax the moneyed value of the franchise, as actually employed and in connection with the property acquired and held by means of the powers conferred with the franchise. The franchise, at least in such connection, is *property* subject to taxation.

We are not required now to decide whether the Congress of the United States has power to exempt from State taxation the property of a corporation created by, or organized under the laws of a State; or whether a corporation, the creature of a State law, can, by entering into contract relations with the general Government, withdraw itself from obligations to its creator—obligations which are essential elements of its existence.

For the purposes of the case at bar it may be admitted (in the language of counsel) that the Government of the United States can “seize upon” the railroad and rolling stock of a corporation, chartered by a State, as the “means or instrumentality” for carrying into operation a power of that Government, and that it can prohibit taxation by the State of the property thus seized. Admitting all this, there is nothing in *McCulloch v. Maryland*, 4 Wheat. 316, or in the other cases cited by petitioner, which lays down a rule necessarily subversive of the provisions of the State Constitution.

In *Thomson v. Pacific Railroad*, 9 Wall. 587, Chief Justice Chase said: “The main argument for plaintiff is, that the road, being constructed under the direction and authority of Congress, for the uses and purposes of the United States, and being a part of a system of roads thus constructed, is, therefore, exempt from taxation under State authority. It is to be observed that this exemption is not claimed *under any Act of Congress*. It is not asserted that any Act declaring such exemption has received the sanction of the national Legislature. But it is earnestly insisted that the right of exemption arises from the relations of the road to the general Government. It is urged that the aids granted by Congress to the road were granted in the exercise of its constitutional powers to regulate commerce, to establish post-offices and post roads, to raise and support armies, and to suppress in-

surrection and invasion; and that by the legislation which supplied aid, required security, imposed duties, and finally exacted, upon a certain contingency, a percentage of income, the road was adopted as an instrument of Government, and as such was not subject to taxation by the State."

After pointing out the wide difference between the case then under consideration and *McCulloch v. Maryland*, the learned Chief Justice proceeded: "We do not doubt, however, that upon the principles settled in that judgment, Congress may, in the exercise of powers incidental to the express powers mentioned by counsel, make or authorize contracts with individuals or corporations for services to the Government; may grant aids by money or land, in preparation for, or in the performance of such services; may make any stipulation and conditions in relation to such aids not contrary to the Constitution; and may exempt, in its discretion, the agencies employed in such services from any State taxation which will really prevent or impede the performance of them.

"But can the right of this road to exemption from such taxation be maintained in the absence of any legislation by Congress to that effect?

"It is unquestionably true that the Court, in determining the second general question, already stated, did hold that the Bank of the United States, with its branches, was exempt from taxation by the State of Maryland, although no express exemption was found in the charter. But it must be remembered that the Bank of the United States was a corporation created by the United States; and, as an agent in the execution of the constitutional powers of the government, was endowed by the act of creation with all its faculties, powers, and functions. It did not owe its existence, or any of its qualities to State legislation. And its exemption from taxation was *put upon this ground*." * * * "That such (State) taxes can not be imposed on the operations of the Government, is a proposition which needs no argument to support it. And the same reasoning will apply to instruments of the Government, *created by itself*, for public and constitutional ends. But we are not aware of any case in which the real estate or other property of a corporation, not organized under an act of Congress, has been held to be

exempt, in the absence of express legislation to that effect, to just contribution, in common with other property, to the general expenditure for the common benefit, because of the employment of the corporation in the service of the government."

"No one questions that the power to tax all property, business, and persons, within their respective limits, is original in the States, and has never been surrendered. It can not be so used, indeed, as to destroy or hinder the operations of the National Government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in Government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection."

"We perceive no limit to the principle of exemption which the complainant seeks to establish. It would remove from the reach of State taxation all the property of every agent of the Government. Every corporation engaged in the transportation of the mails, or of Government property of any description, by land or water, or in supplying materials for the use of the Government, or in performing any service of whatever kind, might claim the benefit of the exemption," etc.

Orders affirmed.

ROSS and McKEE, JJ., concurred.

[No. 8,070.—In Bank.]

Jan. 20, 1882.

WILLIAM H. MARTIN v. FRANK K. ASTON.

ROAD TAX—ROAD PROPERTY TAX—CITY OF SANTA CRUZ—MUNICIPAL CORPORATION.—Under Section 2664 of the Political Code, the road tax and property tax provided for in the preceding sections can not be levied or collected from the inhabitants or property of incorporated towns and cities, which by municipal authority levy such taxes for the streets and alleys thereof.

APPEAL from a judgment for the plaintiff in the Superior Court of Santa Cruz County. LOGAN, J.

Action of replevin. The property was taken by the defendant, who was Assessor of Santa Cruz County, for road

property tax, under Sections 3820 and 3821 of the Political Code. The twelfth finding, referred to in the argument of appellant's counsel, was as follows:

“Twelfth. That said city levied and collected for the fiscal year A. D. 1880–81, upon all the property in said city, the following tax: for the Fire Fund of the city, seven cents on each one hundred dollars; for the purpose of sewerage and drainage of said city, five cents on each one hundred dollars; for the General Fund of said city, thirty cents on each one hundred dollars.”

A petition for rehearing in this case was filed, and denied.

J. M. Lesser, for Appellant.

Section 2664 of the Political Code, in so far as it exempts property within the county from taxation, is unconstitutional and void. (Const. Cal., Art. iii, § 1; *United States v. Riley*, 5 Blatch. 204; *People v. Townsend*, 56 Cal. 633.)

The effect of Section 2664 is virtually to exempt the property situated in the municipal corporation of Santa Cruz from the county road tax, and must be treated as an exemption of the property from its share of the burden.

In *Wilson v. Supervisors of Sutter County*, 47 Cal. 91, the Court said: “An order which remits the taxes upon any property within the district causes the taxation within the district to be unequal, and is virtually an exemption of such property from taxation.” The Act of the Legislature authorizing the remission was held unconstitutional and void.

This property road tax, to the extent of twenty per cent., at all events, is a tax for general county road purposes. (§ 2653, Political Code.) And the exemption of property, in municipalities, from the payment of this tax, necessarily deprives the general county road fund of the proportion which the property in the municipality should contribute for general county road purposes. This creates an inequality in taxation which the Legislature had no authority to make, and the section creating the inequality must be unconstitutional and void.

The rate of taxation must be uniform throughout the division for which it is levied. A State tax must be uniform throughout the State; a county tax throughout the county.

(*East Portland v. Multnomah County*, 6 Or. 62; *Cooley on Taxation*, 180; *Knowlton v. Supervisors*, 9 Wis. 410; *Prim v. City of Belleville*, 59 Ill. 142; *Madison County v. The People*, 58 id. 456; *Dunham v. City of Chicago*, 55 id. 361; *The City of Zanesville v. The Auditor of Muskingum County*, 5 Ohio St. 589, 593.)

Because the city of Santa Cruz is a municipal corporation, having the right to levy certain taxes, it is no less a portion of the County of Santa Cruz. (*Fletcher v. Oliver*, 25 Ark. 289, 296.)

In comparing Section 2664 of the Code with similar laws enacted in other States, we find that in Arkansas and Illinois the matter has been fairly adjudicated. (*Fletcher v. Oliver*, 25 Ark. 289; *Cooper v. Ash*, 76 Ill. 11; *O'Kane v. Treat*, 25 id. 557; *Trustees v. McConnel*, 12 id. 138; *Cooley on Taxation*, 114, 115.)

Second. The municipal corporation of the City of Santa Cruz does not levy a property road-tax "for the streets and alleys thereof."

Section 2664 of the Political Code reads as follows: "The road-tax and property-tax, herein provided for, must not be levied or collected from the inhabitants or property of incorporated towns and cities, which, by municipal authority, levy such taxes for the streets and alleys thereof."

The road law provides for two classes of taxes for road purposes; one called the road-tax, the other a property-tax; the former being a *per capita*, while the latter is an *ad valorem* tax.

The proper construction of Section 2664 appears to be, that if either of these taxes is not levied or collected by the city, the one unlevied and uncollected is payable to the county. The intention of the Legislature was, that the road *per capita* tax should be collected from the inhabitants of the whole county, except where the city, by authority, levies such *per capita* tax for street purposes; and again, the property *ad valorem* tax should be levied on the property of the whole county, excepting such as is situated within the incorporated cities, which, by municipal authority, levy such property *ad valorem* tax for street purposes. So that, if the plaintiff in

this case claims his exemption from the property tax, he must show that the City of Santa Cruz did levy such property *ad valorem* tax for street purposes.

The twelfth finding of the Court shows what taxes the city levied and collected, and speaks of the fire fund, the sewerage and drainage fund, and the general fund. There is no *ad valorem* tax levied for a street fund.

In order to claim the exemption of the property within the incorporation from the taxes, it must be affirmatively shown that an *ad valorem* tax for street purposes was levied by the city of Santa Cruz.

A tax for general purposes does not include the special purpose of streets and alleys, any more than it includes a fire department, or a sewerage or drainage system. The money collected must be used for the purposes for which it is levied. (Dill. on Munic. Corp., § 765.)

Third. The charter of the city of Santa Cruz does not authorize the city to levy such tax "for the streets and alleys thereof."

Municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, unless the power be plainly and unmistakably conferred. (Dill. on Munic. Corp., § 763; *Caldwell v. Rupert*, 10 Bush (Ky.), 182; *Sewall v. St. Paul*, 20 Minn. 511; *Jeffries v. Lawrence*, 42 Iowa, 498; 2 Dill. on Munic. Corp., §§ 763, 764; Cooley on Taxation, 209.)

The exemption, if any there be (as is claimed by the respondent), must be authorized by statute in a clear manner, and the party desiring the advantage of an exemption must bring himself clearly and without equivocation within the exemption before being entitled to the advantages derived from it. (Sedgwick on Stat. and Const. Law, § 466; *Bailey v. Magwire*, 22 Wall. 226; Cooley on Taxation, 146.)

A. E. Bolton and Charles B. Younger, for Respondent.

The city of Santa Cruz is an independent road district, duly incorporated and empowered to maintain her own streets, and having exclusive control and jurisdiction thereof.

The Act of the Legislature of the State of California, incorporating the city of Santa Cruz, provides as follows, Stat.

1875-1876, p. 192, § 9: "It shall have power * * * to lay out, alter, open, vacate, improve, cleanse, water, and repair streets." This the city has done.

The Courts of other States have settled this point. (*The State v. Jones*, 18 Tex. 874; *Goddard, Petitioner*, 16 Pick. 503; *Taintor v. The Mayor and Common Council of Morristown*, 33 N. J. L. 57; *Cross v. Morristown*, 18 N. J. Eq. 305; *Fox v. The City of Rockford*, 38 Ill. 454; *Indianapolis v. Croas*, 7 Ind. 9; *Lafayette v. Jenners*, 10 id. 79; *Town of Ottawa v. Walker*, 21 Ill. 608.)

There can be no doubt from the foregoing that the City of Santa Cruz is an independent road district, having exclusive control of its streets and alleys, and that no part of the general road fund can be expended within its limits. (*People v. Townsend*, 56 Cal. 633; *Knox v. Board of Supervisors of Los Angeles County*, 58 id. 59; *Wells v. City of Weston*, 22 Mo. 384; *Cooley on Taxation*, 105, 109; *Hingham & Quincy Bridge Co. v. Norfolk*, 6 Allen, 353; *Tilford v. Douglass*, 41 Ind. 580; *Town of Pleasant v. Kost*, 29 Ill. 494.)

It is in violation of the Constitution of this State in relation to taxation.

1. Article xi, Section 12, of our Constitution, provides: "The Legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes. (*People v. Parks*, 58 Cal. 624.)

2. "All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law." (Const., Art. xiii, § 1.)

That "taxation must be uniform and equal," is no more than saying each district must pay as it is benefited. (*Weeks v. City of Milwaukee*, 10 Wis. 258; *Cooley on Taxation*, 104.)

3. To collect this tax would be taking private property without compensation. (*People v. Townsend*, 56 Cal. 633; *Wells v. The City of Weston*, 22 Mo. 384; *Cooley on Taxation*, 105.)

If the Board of Supervisors is authorized to levy a road-

tax, by Section 2664 of the Political Code of this State, the tax can not be levied or collected from the inhabitants or property within the City of Santa Cruz.

It is observable of this section that it has been the law since the adoption of the Codes, and has never been repealed or changed.

It is argued that this section is unconstitutional, in that it violates that provision of Article xiii, Section 1, which provides that "all property shall be taxed in proportion to its value." Such would, without doubt, be the case if the inhabitants and property within the city or town were relieved from taxation. Such is not the provision of the section. It provides, in substance, that the city must maintain its own streets and alleys, and, when it so maintains them, then its inhabitants and property will be relieved from taxation for roads outside of the city. When this is done by a city, the county at large is relieved from the burden of maintaining such roads and streets. (*Hunsacker v. Wright*, 30 Ill. 147; *Board of Supervisors v. Campbell et al.*, 42 id. 490; *Tilford v. Douglass*, 41 Ind. 580; *Cooper et al. v. Ash*, 76 id. 11.)

The doctrine of commutation has been passed on in a number of States, the Constitutions of which provide for equal and uniform taxation. (*O'Donnell v. Bailey*, 24 Miss. 386; *Gardner v. The State*, 21 N. J. L. 558; *Daughdrill v. Alta Life Ins. & Trust Co.*, 31 Ala. 91; *M. & St. P. R. R. v. Crawford Co.*, 29 Wis. 116; *Osborn v. N. Y. & N. H. R. R.*, 40 Conn. 491.)

It is argued by appellant that the City of Santa Cruz does not levy a property road-tax. The record shows that the City of Santa Cruz levies a tax upon all the property within the city for a general fund. That out of this fund so raised in compliance with the Charter of the city, the Street Commissioner has been paid. It is his duty to open, repair, and keep the streets of the city, etc. And he has so done.

The record shows that a portion of the streets of the City of Santa Cruz are accepted streets. The streets must be kept up and in repair out of the general fund. (Stats. 1875-1876, p. 198, § 23.)

The COURT:

Under the Charter of the City of Santa Cruz (Stat. 1875-

1876, p. 189, etc.), the Common Council of the city has power to lay out and improve streets within the city, and to raise money therefor by assessment and taxation. The Court below found that all the streets and alleys within the city limits are wholly maintained, improved, and kept in repair by the city. Therefore, according to Section 2664, Political Code, the appellant had no authority to collect taxes for road purposes from inhabitants of or property within the city.

Judgment affirmed.

[No. 10,578.—In Bank.]

Jan. 21, 1882.

THE PEOPLE v. LOUIS M. OLIVIE.

ROBBERY—SUFFICIENCY OF EVIDENCE—BILL OF EXCEPTIONS—AMENDMENT.

APPEAL from a judgment of conviction and from an order denying a new trial in the Superior Court of the City and County of San Francisco. BOWERS, J.

In the original bill of exceptions, appearing in the transcript, there was no evidence whatever tending to show that the defendant was guilty of the crime charged. Subsequently, on the fourteenth day of May, 1881, the Court below made an order reciting that the original bill of exceptions was erroneous, and that the certificate was inadvertently made, and ordering that the same be canceled and set aside; and at the same time settled and certified to a new bill of exceptions, which was filed in the Supreme Court on the seventeenth day of May, 1881.

A. D. Splivalo, for Appellant.

A. L. Hart, Attorney General, for Respondent.

The COURT:

We have had to deal with a great many defective records, but the one filed in this case, is the worst we have ever seen.

The defendant was convicted in the Superior Court, of the crime of robbery, upon an information charging him with

robbing one Stefano Moresi on the thirty-first day of March, 1879, and the following was all the evidence in the case, as appears from the bill of exceptions:

"Stefano Moresi being duly sworn on behalf of the People, testified: That on or about the thirty-first day of March, 1870, S. Moresi had a certain sum of money, to wit, eight twenty-dollar pieces, five five-dollar pieces, and two two-and-a-half dollar pieces, and a silver watch of the value of twenty dollars.

Q. *Where did this take place?*

A. At Hayes Valley.

Q. Where is Hayes Valley?

A. I don't know.

Q. Do you know whether it is in the city and county of San Francisco?

A. I don't know."

"The defendant, *L. M. Oliver*, being duly sworn on his own behalf, testified that at the time of the alleged offense defendant was in Italy, and not in the city and county of San Francisco, and that he had not taken the money or watch of S. Moresi."

"In rebuttal the prosecution examined H. H. Bodie and A. Galley, who testified that at the time of the alleged offense, to wit, on or about March 31, 1879, they were acquainted with *L. M. Oliver*, and at that time said *Oliver* was in the city and county of San Francisco. *This was all the evidence offered.*"

The bill of exceptions simply shows that in March, 1870, S. Moresi had a certain amount of money and a silver watch; but there is not a particle of evidence in the case showing that either the money or the watch ever passed out of his possession by the act of the defendant. In other words, there is a total failure to prove the *corpus delicti*. It was bad enough to fix the time in 1870, instead of 1879, thereby attempting to prove and punish an act long since barred by the statute of limitations; but it was worse, if possible, to omit all evidence of the commission of any crime. If District Attorneys, as well as the judges who try cases, would examine with greater care transcripts that are prepared for this Court, arrange and see that the facts established by the evidence are properly

brought before us on appeal, the ends of justice would be greatly promoted.

We are obliged to reverse the judgment and remand the case for a new trial. It is so ordered.

[No. 10,714.—In Bank.]

Jan. 24, 1882.

THE PEOPLE v. D. W. MILNE.

CHILD-STEALING—INFORMATION—DUPLICITY.—The information charged the defendant and another with the crime of attempting to take and entice away two children under the age of twelve years, with intent to detain and conceal them from a person having their lawful custody; and it was objected, that the information charged two offenses, and that there was no such crime as an attempt to take and entice away a child. *Held*: The objections were not well taken.

ID.—ID.—ID.—A person may by a single act endeavor to accomplish two or more criminal results. In such a case there can be no doubt that if the indictment sets forth the act and the intent to commit the two or more offenses according to the fact, it will not be open to the objection of duplicity. There is but one attempt, though the object aimed at is multifarious.

APPEAL from a judgment of conviction, and from an order denying a new trial, and an order denying a motion in arrest of judgment, in the Superior Court of Lake County. **HUSON, J.**

Robert Ashe, for Appellant.

A. L. Hart, Attorney General, for Respondent.

The COURT:

The defendant and another were accused by the District Attorney of the crime of attempting to take and entice away two children under the age of twelve years, with intent to detain and conceal them from a person having their lawful custody. The defendant Milne demurred to the information, which demurrer was overruled; and after a separate trial he was convicted. Two points are presented on this appeal, viz:

1. That the information charges two separate offenses, in

that the defendants were accused of an attempt to take and entice away two children; and,

2. There is no such crime as an attempt to take and entice away a child.

We do not think that either point is well taken. The offense of child-stealing is pointed out and defined in Section 278, Penal Code; the commission of the offense does not consist in the number, whether one or more, but in the act and intent constituting an attempt. It was the *attempt* for which the defendant was prosecuted, not the consummation. The attempt was but a single fact, though it may have embraced several steps and may have included in its object more than one person.

"A count in an indictment, charging an endeavor or conspiracy to procure the commission of two offenses, is not bad for duplicity, because the endeavor is the offense charged." (Whart. Cr. Pl. and Pr., § 253; *R. v. Bykerdike*, 1 Moo. & R. 179.)

A person may, by a single act, endeavor to accomplish two or more criminal results. "In such a case," says Mr. Bishop, "there can be no doubt, that if the indictment sets forth the act, and the intent to commit the two or more offenses, according to the fact, it will not be open to the objection of duplicity. There is but one attempt, though the object aimed at is multifarious." (Bishop's Cr. Proc. 570. See *King v. Fuller*, 1 Bos. & Pul. 180; 2 Leach, 3d ed., 916.)

As to the second point made by appellant, an answer is found in Section 664, Penal Code.

Judgment affirmed.

[No. 10,694.—In Bank.]

Feb. 1, 1882.

THE PEOPLE v. JOHN R. SIMONS.

JUSTIFIABLE HOMICIDE — SELF-DEFENSE — INSTRUCTIONS. — The Court instructed the jury as follows: "If you believe beyond a reasonable doubt, from the evidence, that the defendant killed the deceased, then, to render said killing justifiable, it must appear that defendant was wholly without fault imputable to him by law, in bringing about or commencing the difficulty in which the mortal wound was given."

Held: Even if the defendant had been the assailant, if he had really and in good faith endeavored to decline any further struggle before the homicide was committed, the killing might be justifiable in self-defense.

Id.—Id.—CONFLICTING INSTRUCTIONS.

APPEAL from a judgment of conviction, and from an order denying a new trial in the Superior Court of Modoc County.
HARRIS, J.

E. S. Spencer, W. L. Skinner, and D. S. & S. L. Terry, for Appellant.

A. L. Hart, Attorney General, for Respondent.

SHARPSTEIN, J.:

Among the instructions given by the Court to the jury were the following: "To justify a person in killing another in self-defense, it must appear that the danger was so urgent and pressing, that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary. And it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given."

"To justify the defendant in killing the deceased it is not absolutely necessary that the defendant should have believed his own life in danger. But it will be sufficient if the circumstances were such as to justify the defendant, as a reasonable man, in believing that the deceased was about to commit any felony, and that it was necessary to take his life to prevent the commission of such felony, and that if the defendant did so believe and acted under such belief solely."

That these instructions are contradictory is apparent, and the first does not differ materially from that given in *People v. Flahave*, 58 Cal. 249, which was held to be erroneous.

Only one of the instructions requested by the defendant was refused by the Court. It should have been given. The reasons assigned by the Court for not giving it are insufficient.

The following instruction was erroneous: "If you believe beyond a reasonable doubt, from the evidence, that the defendant killed the deceased, then to render said killing justi-

fiable it must appear that defendant was wholly without fault imputable to him by law in bringing about or commencing the difficulty in which the mortal wound was given."

Even if the defendant had been the assailant, if he had really and in good faith endeavored to decline any further struggle before the homicide was committed, the killing might be justifiable in self-defense. (Pen. C., § 197.)

Judgment and order reversed, and cause remanded for a new trial.

THORNTON, J., concurred.

ROSS, J., concurred in the judgment, on the ground last stated in the opinion.

MORRISON, C. J., concurred in the judgment of reversal.

[No. 10,682.—In Bank.]
Feb. 2, 1882.

THE PEOPLE v. JOHN HURLEY.

POSSESSION OF STOLEN PROPERTY — LARCENY — PRESUMPTION.—To justify the inference of guilt from the fact of possession of stolen property, it must appear that the possession was personal, and that it involved a distinct and conscious assertion of possession by the accused.

Id.—Id.—Id.—The better opinion seems to be, that the presumption arising from possession alone is completely removed by the *good character alone* of the prisoner.

Id.—Id.—Id.—A finding of stolen property in the prisoner's house or apartment, is equally competent in evidence against him as a finding upon his person; but the house or room must be proved to be in his exclusive occupation. If the property were in a locked-up room or box, of which he kept the key, it would be a fair ground for calling upon him for his defense. But if it were only found lying in a house or room in which he lived jointly with others equally capable of having committed the theft, it is clear that no definite presumption of guilt could be made.

Id.—Id.—Id.—The bare fact of finding the hides of cattle, that had been stolen, in the defendant's barn, which was shown to have been open to any one who chose to enter it, in the absence of any evidence tending to prove that he knew or had any reason to suppose that such hides were there, is not sufficient to justify the inference of guilt; and until his declaration, that he knew nothing about the hides being there, was shown to be false, he was not called upon to give any explanation as to how they came there.

APPEAL from a judgment of conviction, and from an order denying a new trial in the Superior Court of Humboldt County. HAYNES, J.

No briefs on file.

SHARPSTEIN, J.:

The fact that the hides of the cattle alleged to have been stolen were found in the defendant's barn, is not controverted. And we think that they were found there within a sufficiently recent period, after the loss of the cattle, to answer the requirements of the law in that respect.

But that is not all that is required to warrant the inference that the defendant stole the property. To justify that inference it must further appear that the possession was personal, and that it involved a distinct and conscious assertion of possession by him. And even then such possession may be explained. (Whart. Cr. Ev., § 758.) Now the facts as they appear in evidence in this case are that the cattle alleged to have been stolen were first missed on the twenty-fourth of October, 1879, and their hides were found in the defendant's barn on the twenty-seventh of November, 1879.

Within a few days after the cattle alleged to have been stolen were missed, and before the discovery of their hides, the defendant killed some cattle, which he, his wife, son, and daughter testify were his own; and none of them are contradicted or impeached. Nor do we discover anything suspicious in the conduct of the defendant as described by the witnesses who saw him at the time when he was killing these cattle, or disposing of their carcasses. And the cattle which he is proved to have killed were so unlike those alleged to have been stolen, as to preclude the idea of his having mistaken the latter for his own. He slaughtered them as he naturally would if killing his own; called in one neighbor to assist him; invited another to inspect his barn with him while some of the beef was suspended there; and disposed of it as he had been in the habit of disposing of beef before. The officer who arrested the defendant testifies that when the hides were brought out of the barn, the "defendant said that it was a put-up job on him; that he knew nothing about the hides being in his barn."

The barn was never locked, and the neighbors went into it whenever they chose, which, one of the witness stated, was almost daily. The hides, when discovered, were hanging upon a pole, visible to all who might enter the barn. The defendant and several members of his family, together with one or more other witnesses, testify that they entered the barn repeatedly during the period intervening the loss of the cattle alleged to have been stolen and the discovery of the hides, and that during that intervening period they saw no hides there, although they thought they should have seen them if there. There is no conflict in the evidence upon any material point. As we view it, there is none, except the bare fact of the discovery of the hides of the missing cattle in the defendant's barn, which militates in any degree against him.

The assertion that the recent possession of stolen goods in a case of larceny raises a presumption that they were stolen by the possessor, is not strictly accurate. The cases in which that has been said are those in which it also appeared that the possessor acquired the possession by his own act, or with his own concurrence or knowledge. If it had been shown in this case that the defendant placed these hides in his barn, or caused them to be placed there, or knew that they were there, or exercised any acts of possession over them, the case would be essentially different from what it now is. His explanation "that he knew nothing about the hides being in his barn" was the only one which he could give unless he did know something about their being there; and the only way to prove his explanation false was to prove that he did know something about it. But there is no evidence which tends to prove that he did. If true, his explanation was as satisfactory as any ever given of the possession of stolen property; and it was incumbent on the prosecution to prove it untrue before asking a conviction.

In Cowen & Hill's notes to Phillips on Evidence, 530, it is said, "that although a finding even in the prisoner's house is admissible, yet where there is not a more direct possession shown, and there are other inmates in the house capable of stealing the goods, this finding *per se* would not raise the presumption. Other circumstances should be shown. And the reason is stronger of a finding in the prisoner's open shop."

And in a note following that from which the above quotation is taken, it is said: "The better opinion seems to be that the presumption arising from possession alone is completely removed by *the good character alone* of the prisoner." The good character of the defendant in this case was testified to by witnesses who stated that they had known him fourteen years, and no attempt was made to rebut their testimony.

In *Crozier v. The People* (1 Park. Cr. 447), a part of the goods alleged to have been burglariously stolen were found in the unlocked trunk of C., on board of a steamboat. The Court said that "the fact that a portion of the goods were found in the prisoner's trunk *under such circumstances*, is little if any stronger than it would have been had they been found in some other part of the boat."

And in a case where stolen tobacco was found in an out-house of the prisoner with tobacco belonging to him, and who claimed that the stolen property was his own, it was held that in the absence of proof that the tobacco did not resemble his own, a legal inference of the guilt of the prisoner could not be drawn from such possession. (*State v. Smith*, 2 Ired. (N. C.) 402.)

Burrill states the law as follows: "The possession must be exclusive. A finding of stolen property in the prisoner's house or apartment, is equally competent in evidence against him, as a finding upon his person. But the house or room must be proved to be in his exclusive occupation. If the property were in a locked-up room or box, of which he kept the key, it would be a fair ground for calling upon him for his defense. But if it were only found lying in a house or room in which he lived jointly with others equally capable of having committed the theft, it is clear that no definite presumption of guilt could be made." We do not think that the bare fact of finding the hides of cattle that had been stolen in the defendant's barn, which is shown to have been open to any one who chose to enter it, in the absence of any evidence tending to prove that he knew or had any reason to suppose that such hides were there, sufficient to justify the inference which the jury must have drawn from it, in order to find the defendant guilty. And we also think that until his declaration that he knew nothing about the hides being

there was shown to be false, he was not called upon to give any explanation as to how they came there. If he did not know that they were there, he could not explain how they came to be there. As we view it, this case is much weaker for the prosecution than either *The People v. Noregea* (48 Cal. 123), or *The People v. Swinford* (57 id. 86), in both of which the judgments were reversed on the ground of insufficiency of the evidence to justify the verdict.

Judgment and order reversed and cause remanded for a new trial.

MYRICK, J., MORRISON, C. J., and THORNTON, J., concurred.

[No. 10,716.—Department Two.]

Feb. 4, 1882.

EX PARTE CHIN YAN.

MUNICIPAL ORDINANCE—JUDGMENT—FINE AND IMPRISONMENT.—The petitioner was convicted in the Police Court of the city and county of San Francisco under Section 33 of Order No. 1,587 of the city and county, of a misdemeanor, in visiting a place for the practice of gambling. The judgment was "that said Chin Yan pay a fine of twenty (20) dollars, and in default of payment thereof, that said Chin Yan be imprisoned in the County Jail of this city and county for the period of ten days;" and the commitment was "for the period of ten days or until the said fine should be paid or satisfied."

Held: We consider this judgment valid and lawful upon the authority of *Ex parte Ellis*, 54 Cal. 204. The authority given to the Sheriff to arrest and imprison the defendant for the period of ten days or "until said fine has been paid or satisfied," authorizes the petitioner to claim his release, when the fine has been satisfied by the imprisonment, or partly by payment of money and partly by the imprisonment, estimating the latter at two dollars per day during the period of imprisonment. Such is a fair deduction from the judgment.

ID.—CONSTITUTIONAL LAW.—The section referred to is not unconstitutional, as opposed to Subdivision 2, Section 25 of Article iv of the Constitution of 1879. Section 3 of the amendment of the consolidation act of April 25, 1863, gives full authority to the Board to pass the order under consideration and the act itself is not unconstitutional. The object of the article of the constitution relating to local legislation is to restrain the Legislature from passing laws of the character mentioned. The Legislature can authorize by general laws, under the present Constitution, ordinances of that character to be passed by a municipal corporation.

Id.—Id.—CASES DISTINGUISHED.—The Traylor Act, declared unconstitutional in *Earle v. Board of Education* (55 Cal. 481), was an act of the Legislature. *Desmond v. Dunn*, 55 Cal., 242; and *McDonald v. Patterson*, 54 Id. 245, have no reference to the question before us.

Id.—Id.—UNREASONABLE ORDINANCE.—Where the Legislature in terms confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the Constitution, an ordinance passed pursuant thereto can not be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental powers of the corporation, or under a grant of power general in its nature. In other words, what the Legislature distinctly says may be done can not be set aside by the Courts because they may deem it unreasonable or against sound policy. But where the power to legislate on a given subject is conferred and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid.

APPLICATION for discharge on writ of *habeas corpus*.

Robert Ashe, for Petitioner.

THORNTON, J.:

In this case, the Petitioner, Chin Yan, was convicted in the Police Court of the city and county of San Francisco under Section 33 of Order No. 1,587 of the city and county, of a misdemeanor, in visiting a place for the practice of gambling. The above section is in these words:

"Sec. 33. No person shall, in that portion of the city and county bounded by Larkin, Market, Church, Eighteenth, and Channel streets, and the water front, keep or maintain, or become an inmate of, or a visitor to, or shall in any way contribute to the support of any disorderly house, or house of ill-fame, or place for the practice of gambling; or knowingly let or underlet, or transfer the possession of any premises for use by any person for any of said purposes. Every person who shall violate any of the provisions of this section shall be deemed guilty of a misdemeanor, and punished by a fine of not less than twenty dollars or imprisonment not less than ten days."

It will be observed that the punishment under this ordinance is a fine of not less than twenty dollars or imprisonment not less than ten days. The judgment is as follows:

"In the Police Judge's Court of the city and county of San Francisco, State of California.

"WEDNESDAY, December 1, 1881.

"Present presiding: Hon. Hale Rix, Police Judge.

"The *People of the State of California v. Chin Yan* convicted of Mis. Visiting gambling place:

"In this action the defendant personally appears for sentence. The Court renders its judgment: That whereas the said Chin Yan having been duly convicted in this court of the crime of Mis. Visiting a gambling place; it is ordered and adjudged, as a punishment therefor, that the said Chin Yan pay a fine of twenty (20) dollars, and in default of payment thereof, that said Chin Yan be imprisoned in the County Jail of this city and county for the period of ten days." (The preceding is the original judgment.)

"And, whereas, said fine has not been paid, these are therefore in the name of the People of the State of California to command you, the said Sheriff of the city and county of San Francisco, forthwith to take, arrest, and safely keep and imprison the said Chin Yan in the County Jail of the said city and county of San Francisco, State of California, for the period of ten (10) days, or until said fine has been paid or satisfied; and these presents shall be your authority for the same.

"Witness my hand and the seal of the said Police Judge's Court, this twelfth day of December, 1881.

"Hale Rix, Judge of the Police Judge's Court of the city and county of San Francisco."

We consider this judgment valid and lawful upon the authority of *Ex parte Ellis*, 54 Cal. 204. The authority given to the Sheriff to arrest and imprison the defendant for the period of ten days or "*until said fine has been paid or satisfied*," authorizes the petitioner to claim his release, when the fine has been satisfied by the imprisonment, as partly by payment of money and partly by the imprisonment, estimating the latter at two dollars per day during the period of imprisonment. Such is a fair deduction from the judgment.

But another question arises and has been argued, upon the validity of the thirty-third section of the ordinance, under which the conviction was had. The section has been quoted

in full above. It is contended that it is unconstitutional, as opposed to Subdivision 2, Section 25 of Article iv of the Constitution of 1879.

By the third section of the act of April 25, 1863 (Stats. 1863, p. 540), which is an amendment of the Consolidation Act, it is provided "that the Board of Supervisors of the city and county of San Francisco shall have power by regulation or order."

First—* * *

Second—* * *

"Third—To prohibit and suppress or exclude from certain limits all houses of ill-fame, prostitution, and gaming; to prohibit and suppress or exclude from certain limits or to regulate all occupations, houses, places, pastimes, amusements, exhibitions and practices, which are against good morals, contrary to public order and decency, or dangerous to the public safety."

The foregoing, if valid, gives full authority to the Board to pass the order under consideration. It is said that this is invalid, as opposed to the clause of the Constitution above referred to. That clause is a restriction on the powers of the Legislature to pass *local or special laws*, "for the punishment of crimes and misdemeanors." The object of the article of the Constitution in which this clause is found, is to restrain the Legislature from passing laws of the character mentioned. The Legislature can authorize by general laws, under the present Constitution, ordinances of that character to be passed by a municipal corporation. If this were not so, it could confer no legislative power at all on such corporations, for all the ordinances which such corporations adopt must be local, as they can have no operation beyond the district of the municipality. The clause referred to has no application here. The Act of 1863 was constitutional when passed, and there is nothing in the present Constitution which annuls it. It still remains a valid law. (See §§ 6, 7, 8 of Article xi of the Constitution.)

The Traylor Act, declared unconstitutional in *Earle v. The Board of Education* (55 Cal. 489), was an act of the Legislature. *Desmond v. Dunn*, 55 Cal. 242, and *McDonald v. Paterson*, 54 Id. 245, have no reference to the question before us.

The power to declare the offense in question punishable as a misdemeanor comes from Section 74, Subdivision *eleventh* of the Consolidation Act. The Act of April 25, 1863, is, in our view, constitutional.

But it is said that this order is in conflict with the law of the State on the same subject, and we are referred to Section 330 of the Penal Code. It is said that this section does not make visiting a gaming-house a penal offense. This may be granted, and still there is no conflict, and for the sufficient reason that Section 330 of the Penal Code does not make such act an offense, does not refer to it at all, and the order does. The State Legislature can in the future legislate on the subject, and both the statute then passed and the ordinance may stand together. (Cooley's Const. Lim. 242, and notes.) We find nothing in the order to conflict with the section of the Penal Code referred to. We are not referred to any other State law, nor are we aware of any other in conflict with such order. This contention of the petitioner is not maintainable.

The case *Ex parte Mary Maguire* has no feature in common with the case before us. It arose upon a construction of a section of the Constitution, entirely different from any invoked here. The section is the 18th of Art. xx, and is in these words: "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession." If there is any disqualification in the case before us, *on account of sex*, we have failed to ascertain it.

It is further urged that the ordinance is *unreasonable*, and therefore *void*. On this subject, the rule is this: Where the Legislature in terms confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the Constitution, an ordinance passed pursuant thereto can not be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental powers of the corporation, or under a grant of power general in its nature. In other words, what the Legislature distinctly says may be done can not be set aside by the Courts because they may deem it unreasonable or against sound policy. But where the power to legislate on a given subject

is conferred and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid. Such is the rule as stated by Judge Dillon in his excellent work on Municipal Corporations, Section 328. The rule is sustained by common law and by authority. It is the outcome of a judicious application of legal principles. (See *Peoria v. Calhoun*, 29 Ill. 317; *St. Paul v. Colter*, 12 Minn. 41; *Brooklyn v. Breslin*, 57 N. Y. 591; *State v. Clark*, 54 Mo. 17, 36.)

The rule that ordinances must not be unreasonable finds its proper field of application when the municipality acts under its implied power to legislate—to pass by-laws or ordinances. (Dill. Munic. Corp., § 319.) When the power to pass ordinances is given, and no mode prescribed for the exercise of the power, it must then be exercised as above seen in a reasonable manner. (Id., § 328.)

The power to legislate by order or regulation is plainly given by the Act of April 25, 1863 (Stats. 1863, p. 540), "to prohibit and suppress, or exclude from certain limits" all houses of gaming, to do the same thing as to all practices against good morals and contrary to public order and decency. The power to act within certain limits is conferred. The limits must be defined by the Board of Supervisors. This matter of limits is left to their judgment and discretion. The Legislature has vested it in them, by a valid act, and this Court can not revise the exercise of this discretion by the Board. (*State v. Clark*, 54 Mo. 17, 36.) The Board must pass on the expediency and reasonableness of the limits fixed in their order. We see nothing unreasonable in the exercise of the power in the mode declared by the section of the order under discussion.

But it is said it is not *impartial, fair, and general*, and it is asked why should an act be lawful east of Larkin street and unlawful west of it. The foregoing answers the question. The matter of definition of limits was left by the Legislature to the Board. The requirement that it must be impartial, fair, and general, only applies to the defined districts. It must be impartial, fair, and general within the eastern district. It is so. It must be of the same character as to the western district. And we find that it is within such district

impartial, fair, and general. In each district it operates on all alike. (Dill. Munic. Corp., § 322, and cases cited in notes.) The ordinances in relation to fire limits and slaughter-houses are instances of the exercise of a like power as the above.

An untenable interpretation of the order is urged upon us, that the reference is to "a house of *prostitution and gaming*," that the reference is to a house where both are carried on. We can not agree with the learned counsel. Such is a misinterpretation of the language of the order.

The petitioner is legally held, and must be remanded to the custody of the Sheriff of the city and county of San Francisco.

So ordered.

MYRICK and SHARPSTEIN, JJ., concurred.

[No. 10,725.—Department Two.]

Feb. 4, 1882.

EX PARTE CHARLES LAWRENCE.

MUNICIPAL ORDINANCE—JUDGMENT—FINE AND IMPRISONMENT.

APPLICATION for discharge on *habeas corpus*.

The prisoner was convicted in the Police Court of the city and county of San Francisco of misdemeanor in disturbing the peace, and was sentenced to pay a fine of twenty dollars and in default of payment to be imprisoned in the County Jail for the period of ten days. The commitment was for ten days or until the fine should be paid.

No briefs on file.

The COURT:

In this cause, the only question is as to the judgment, which is similar to that in the case of Chin Yan, No. 10,716. On the authority of that case, with the result of which we are satisfied, this must be determined, and it follows from it that the petitioner is not entitled to be discharged, and he will therefore be remanded to the custody of the Sheriff of the city and county of San Francisco.

So ordered.

[No. 10,687.—In Bank.]

Feb. 10, 1882.

THE PEOPLE v. AH LEE ET AL.

MURDER—INSTRUCTIONS—PLEA OF “NOT GUILTY”—ISSUES.—The Court in its charge to the jury among other things said: “The evidence in this case upon the point whether the defendants or either of them are the persons who committed the offense with which they are charged, is conflicting. The defendants, by their plea of not guilty, have rested their defense upon the *sole ground* that they nor either of them are the persons who committed the offense of which they stand charged. It follows from this statement of the case, if you find from the evidence beyond a reasonable doubt that they are the persons who killed or aided and assisted in the killing of the deceased at the time, and in the manner charged in the information, then *you must find the defendants guilty of murder of the first degree*, as there are no circumstances in the case to reduce the offense below that degree.” *Held*: This instruction is clearly erroneous.

Id.—RES GESTÆ.—(Sharpstein and Thornton, JJ.) On the trial the District Attorney over the objection of defendant was permitted to ask the witness the following question: “Have you told all that you heard either of the parties (the deceased or defendants) say at the time of the stabbing or *immediately after*?”

Held: Where declarations offered in evidence are merely narrative of a past occurrence, they can not be received as proof of the existence of such occurrence.

APPEAL from a judgment of conviction and from an order denying a new trial in the Superior Court of Butte County.
HUNDLEY, J.

Lyman I. Mowry, for Appellant.

W. A. Nygh and *A. L. Hart*, Attorney General, for Respondent.

SHARPSTEIN, J.:

The Court in its charge to the jury among other things said:

“The evidence in this case upon the point, whether the defendants or either of them are the persons who committed the offense with which they are charged, is conflicting. The defendants, by their plea of not guilty, have rested their defense upon the *sole ground* that they nor either of them are

the persons who committed the offense of which they stand charged. It follows from this statement of the case, if you find from the evidence beyond a reasonable doubt that they are the persons who killed or aided and assisted in the killing of the deceased at the time, and in the manner charged in the information, then *you must find the defendants guilty of murder of the first degree*, as there are no circumstances in the case to reduce the offense below that degree."

It seems to us that this instruction is clearly erroneous. In the first place the defendants did not by their plea of "not guilty" necessarily rest their defense upon the sole ground that they nor either of them were the persons who committed the offense charged in the information. "The plea of not guilty puts in issue every material allegation of the indictment or information." (Pen. C., § 1019.) And all matters of fact tending to establish a defense, except a former acquittal, or conviction, or once in jeopardy, may be proved under a plea of the general issue. (Id., §§ 1016 and 1020.) And why it should follow from the statement of the case, as made by the Court, that if the jury found that the defendants killed or aided and assisted in killing the deceased, it must "find the defendants guilty of murder of the first degree, as there were no circumstances in the case to reduce the offense below that degree," is to us incomprehensible. And we think it to be well settled in this State that it was error to instruct the jury that there were no circumstances in the case to reduce the offense below that of murder of the first degree. The question whether the killing was perpetrated with the deliberation and premeditation necessary to constitute it murder in the first degree, was one which it was "peculiarly the province of the jury to determine." (*People v. Valencia*, 43 Cal. 552; *People v. Woody*, 45 Id. 289; *People v. Gibson*, 17 Id. 283.)

On the trial, the District Attorney put the following question to the witness Ah Hung: "Have you told all that you heard either of the parties (the deceased or defendants) say at the time of the stabbing or *immediately after*?" The question was objected to by the defendants' counsel on the ground, among others, "that 'immediately after' is a very obscure phrase and may not bring whatever was said by the deceased within the rule of *res gestæ*, and therefore it is incom-

petent." The objection was overruled and defendants excepted. Before the witness answered, the District Attorney said to him: "At the time Lum Yen was running away—right there at the time—tell me everything that was said." The witness then said: "Lum Yen ran down to the store after he was cut, he hallooed murder and ran down to the store. I went down and deceased told me, 'If I die, you look after those men, Ah Toon, Ah You, and Ung Oon. If I do not die you need not attend to it at all.'"

Then the District Attorney asked the following questions, to which the witness gave the following answers:

"Q. While Lum Yen was running down there did he not cry murder, and say that these parties had stabbed him or killed him?

"A. Yes.

"Q. While he was running down?

"A. Yes.

"Q. *And immediately after too?*

"A. Yes."

At this point the attorney for the defendants said: "We object on the ground that the witness has testified and given the names of parties, and the District Attorney then turns around and asks him if it was not these parties, pointing to the defendants." The objection was overruled and the defendants excepted.

If we were to assume that the questions as to what the deceased said immediately after he was stabbed were objectionable, it is not quite clear that the exception could be maintained. After the objection to the first question containing the words objected to had been overruled, and before the witness answered, the District Attorney put another question in which those words were omitted. But the witness in his answer stated what was said by the deceased some time after he was stabbed. So far as the answer was not responsive to the question, the defendants upon motion would have been entitled to have it stricken out. But no such motion was made. And the objection to the last question is not based upon the ground that it called for a statement of what the deceased said after the termination of the act

with which the defendants were charged, and therefore not a part of the *res gestæ*.

But we shall discuss the question of the admissibility of the statement of this witness as to what the deceased said after he reached his store, as if the objection to its introduction and the exceptions to the rulings of the court in admitting it had brought the question fairly before us. We deem this course advisable because the case will have to go back for a new trial. What the deceased said at any time when the defendants were not present was not admissible in evidence against them, unless shown to be a part of the *res gestæ*, or dying declarations of the deceased. It is not claimed that any statements made by the deceased were admissible as his dying declarations, but it is claimed that those made *immediately after* the stabbing were admissible as a part of the *res gestæ*.

There are cases which hold that declarations made by the party injured, as to the cause and manner of the injury which terminated in his death, are admissible in evidence against the person charged with the homicide, although made after all action on the part of the wrong-doer, actual or constructive, had ceased. (*Commonwealth v. McPike*, 3 Cush. 181; *People v. Vernon*, 35 Cal. 49.)

In the former case it was held that the declarations of a person, who was wounded and bleeding, that the defendant had stabbed her, made immediately after the occurrence, though with such an interval of time as to allow her to go from her own room up stairs into another room, was admissible in evidence, after her death, as a part of the *res gestæ*. In the latter case the evidence of the declarations was held to be admissible on the ground that they were made within three fourths of a minute after the first shot was fired, which was immediately succeeded by three other shots. In both of these cases the admissibility of the evidence of such declarations is made to depend upon the length of time which elapsed between the inflicting of the fatal wound and the making of the statement. If that be the criterion, it is quite evident that the requisite length of intervening time will vary as it did in the cases above cited; and in the admis-

sion of testimony of this character much would have to be left to the exercise of the sound discretion of the Judge at the trial.

There are two English cases (*Thompson v. Trevanion*, Skin. 402, and *Rex v. Foster*, 6 Car. & P. 325), which sustain the doctrine of *Commonwealth v. McPike* and *People v. Vernon*, *supra*. Of the two English cases Mr. Roscoe says: "These two cases are difficult to reconcile with established principles. It is to be observed that both extend to the particulars of what was said, and though they were both made in close proximity to the event to which they profess to relate, it seems very questionable indeed whether that ground alone, as is presumed by Lord Holt, is sufficient to render them admissible. In *R. v. Foster*, there was the additional circumstance that the person who made the statement was dead; but it seems to require much consideration whether, as a general rule, the statements of a deceased person as to the circumstances of the injury which caused his death, made *immediately after* the injury, but not under circumstances which entitle them to be considered as dying declarations, are receivable in evidence." (Roscoe's Cr. Ev. 261.) In *R. v. Bedingfield*, tried in 1879, the prosecution offered to prove that the deceased, some ten or fifteen minutes before her death, coming from her house, at a distance of fifteen or twenty yards from her door, holding her apron to her throat, exclaimed: "Oh, dear aunt, see what Bedingfield has done," Bedingfield not being present at the time. Cockburn, C. J., with the concurrence of Field and Manisty, JJ., held that the evidence was inadmissible.

To a criticism upon this ruling, the Chief Justice replied in a pamphlet, in which, among other things, he said:

"What, then, are these limits, and where, looking to the law as it exists, are we to draw the line? In other words, what is the meaning of the term *res gestæ* as applied to a criminal case? To this I should propose to answer thus:

"Whatever act or series of acts constitute, or in point of time immediately accompany and terminate in the principal act charged as an offense against the accused, from its inception to its consummation or final completion, or its prevention or abandonment, whether on the part of the agent or wrong-

doer in order to its performance, or on that of the patient or party wronged in order to its prevention, and whatever may be said by either of the parties during the continuance of the transaction, with reference to it, including herein what may be said by the suffering party, though in the absence of the accused during the continuance of the action of the latter, actual or constructive, *e. g.*, in the case of flight or applications for assistance, form part of the principal transaction, and may be given in evidence as part of the *res gestæ* or particulars of it; while, on the other hand, statements made by the complaining party, after all action on the part of the wrong-doer, actual or constructive, has ceased, through the completion of the principal act or other determination of it by its prevention, or its abandonment by the wrong-doer, such as, *e. g.*, *statements made with a view to the apprehension of the offender, do not form part of the res gestæ, and should be excluded.*

“Whatever, whether acts or words, forms part and parcel of the fact which is the subject of the judicial inquiry, presents no difficulty. Words uttered during the continuance of the main action, whether by the active or the passive party, though they can not amount to acts for which the accused can be held responsible, yet may so qualify or explain the act or acts they accompany, that they become essential to the due appreciation of them. There is every reason, therefore, for considering words so spoken during the doing of an act charged as the offense, as part and parcel of the act itself. Moreover, words so spoken are generally admissible on another ground, clearly not open to exception, namely, that they are uttered in the presence and hearing of the accused. But even where the accused is no longer present, if the words are the immediate and natural effect and consequence of continuing action on his part, though uttered out of his hearing, they may well be considered as part of the transaction. Thus, to illustrate what I mean by a case not unlikely to occur: If a party assailed should succeed in escaping from the immediate attack and presence of his assailant, and should, while apprehending immediate danger, make a declaration in his flight with a view to obtaining assistance, such a declaration would be admissible, but not so if the declara-

tion were made after all pursuit or danger had ceased. Or, to take another not unlikely case: A man is awaked in the night by hearing sounds as of some one breaking in at the back of his premises. He hastens to a back window and sees a man whom he knows endeavoring to break in. He rushes to a front window opening to the street, and calls to a passer-by or to a neighbor for assistance, stating who it is that is breaking in. Or a man finds himself waylaid by another who makes a murderous assault on him; whereupon, succeeding in making his escape, he flies, and, outrunning his assailant, applies to the first person he meets for protection, stating what has happened, and who it is that has assailed him, and from whom he apprehends danger. In either of such cases, I should have no hesitation in holding the statement to be properly part of the *res gestæ*. The statement is the immediate effect of the continuing, at all events constructively continuing, act of the wrong-doer. But if, in either of these cases, on the alarm being given, the wrong-doer were to desist and take to flight, statements subsequently made by the injured party to third persons would, I think, stand on an entirely different footing." (Whart. Crim Ev., § 263, note.) He reviewed *Rex v. Foster* and *Commonwealth v. McPike*, *supra*, and dissented from the views therein expressed, upon this point.

It is perfectly obvious that there is a limit to the time within which such statements must be made in order to be admissible in evidence as a part of the *res gestæ*. But if made after the termination of the act to which they refer, they are merely narrative of a past transaction, whether made within a minute or an hour afterward. And "where declarations offered in evidence are merely narrative of a past occurrence, they can not be received as proof of the existence of such occurrence." (1 Greenl. Ev. 110.) "An act can not be varied, qualified, or explained either by a declaration which amounts to no more than a mere narrative of a past occurrence, or by an isolated conversation held, or an isolated act done, at a later period." (1 Taylor's Ev. 53.)

In the case now before us, it does not appear that anything occurred between the defendants and the deceased after the stabbing, and yet the prosecution was permitted to ask the

witness what he heard "either of the parties say at the time of the stabbing or *immediately after*." In response to it the witness might have stated what was said by the injured party after the assailants had fled, and he himself had reached a place of safety. And such appears to have been the construction which the witness, Court, and counsel placed upon the question. The statement to which the witness testified related to an act which had been completed, and the statement was clearly "made with a view to the apprehension of the offenders."

If evidence of such statements is admissible, the rule which requires that declarations made by an injured party at any time after the infliction of the injury, must be made under a belief of impending death, in order to be admissible in evidence, should be abrogated. The distinction between statements which constitute a part of the *res gestæ* and those which constitute "dying declarations" should be clearly defined or obliterated. But we think that the line which separates statements which are admissible in evidence as a part of the *res gestæ* from those which are admissible only as dying declarations, is well defined by Mr. Chief Justice Cockburn.

Judgment and order reversed, and case remanded for a new trial.

THORNTON, J., concurred.

MCKINSTRY and ROSS, JJ., concurred in the judgment on the ground first stated in the opinion of Mr. Justice Sharpstein.

MORRISON, C. J., concurred in the judgment of reversal.

MYRICK, J., dissented.

[No. 8,056.—Department Two.]

Feb. 11, 1882.

C. S. ROE v. THE SUPERIOR COURT OF THE CITY
AND COUNTY OF SAN FRANCISCO.

JURISDICTION—PRESUMPTION IN FAVOR OF JUDGMENT—CERTIORARI—CONTEMPT—TRIAL.—Upon an application for a writ of *certiorari* to review a judgment for contempt of Court, the record sought to be reviewed consisted of the affidavits of the facts constituting the contempt, the answer of the party charged, and the judgment for contempt; the last of which stated that the matter had been regularly heard; and it was contended that witnesses should have been examined in the court below.

Held: It does not appear that this course was not pursued.

ID—ID—ID—CORRECTION OF RECORD.—When jurisdiction is once had of the subject-matter in person, every intendment must be made to support the judgment. If the record is incorrect, it must be corrected by motion, or suggestion to the court below.

APPLICATION for writ of *certiorari*.

J. D. Sullivan and *Eugene N. Deuprey*, for the Plaintiffs.

No briefs on file.

THE COURT:

We have examined the record in this matter, and are of opinion that the Court had jurisdiction of the subject-matter and the parties and regularly exercised its jurisdiction. Our examination must be confined to the record. We can go no further. The record in this proceeding for contempt before us is: 1. Affidavits of the facts constituting the contempt. (C. C. P., § 1211.) 2. Answer of Roe. (Id., § 1217.) 3d. Judgment adjudging Roe guilty of contempt.

The judgment states that the matter had been regularly heard, thus showing there was a trial.

It is contended that according to the statute witnesses must be examined (C. C. P., § 1217), and the judgment must be on the answer and evidence (Id., § 1218). That is so, but it does not appear that this course was not pursued. The record must show error, for when jurisdiction is once had of subject-matter and person, as clearly appeared in this case, every intendment must be made to support the judg-

ment. Moreover, the production of witnesses might have been waived and Roe might have consented to trying the case on affidavits.

We must take the record as true. If the contrary is the fact, it must be corrected by motion or suggestion to the Court below. This Court cannot alter the record of the Court *a quo*. The record shows, in our judgment, jurisdiction in the Court, and that the Court regularly pursued its authority.

The judgment of the Court below is affirmed.

[No. 7,284.—Department Two.]

Feb. 20, 1882.

CHARLES MARTIN ET AL. v. L. W. WALKER ET AL.

ESTOPPEL—RES ADJUDICATA—PARTITION—SUPPLEMENTAL ANSWER.—In an action of partition the Court below found that the plaintiffs were tenants in common with the defendants, but rendered judgment for the latter on the ground that they were in the adverse possession of the land at the time the suit was commenced; but the judgment was reversed in this court, and the cause remanded with directions to make partition. Intermediate judgment of the lower court and the reversal the defendants recovered judgment in an action of ejectment for the same land brought by the plaintiffs against them.

Held: The judgment subsequently recovered can be pleaded in the partition suit.

MOTION to modify the judgment heretofore rendered by the Supreme Court. (Reported 58 Cal. 590.)

E. S. Lippett and *C. V. Grey*, for Appellants.

A. W. Thompson, for Respondents.

The COURT:

The motion to modify the judgment is denied. We do not see that the defendant can not plead the judgment subsequently recovered in the action brought by plaintiffs against him.

[No. 10,671.—In Bank.]

Feb. 24, 1882.

THE PEOPLE v. LEE AH YUTE.

IMPEACHMENT OF WITNESS—LEADING QUESTION.—Where a witness has been asked, on cross-examination, if he had not used particular expressions for the purpose of laying a foundation for contradicting him, and has denied that he has done so, the witness called to contradict him may be asked if he did not make the particular statement in question.

STATEMENT OF ATTORNEY TO JURY—TRIAL.—An erroneous statement of the testimony to the jury by counsel in the trial of cause, is not an error for which a new trial will be awarded.

APPEAL from a judgment of conviction, and from an order denying a new trial in the Superior Court of the City and County of San Francisco. **FRELON, J.**

No briefs on file.

MORRISON, C. J. :

On the trial of this case in the Superior Court, the defendant offered himself as a witness, and on his cross-examination was asked if he did not, on a former trial of the case, testify "that he (defendant) was, at a time mentioned, in the house of the deceased, talking with the deceased and with a woman named Ah Heong immediately prior to the shooting, and that while there he saw Lee Wing look through the window?" The defendant denied that he had ever so testified, and for the purpose of contradicting him, the Chinese interpreter, Louis Locke, was called for the prosecution, and he was asked if the defendant did not testify in the manner stated. Objection was made to the question, on the ground that it was leading, and that the proper course was to ask the impeaching witness to state what the defendant did swear to on the former trial. The Court overruled the objection, and it is claimed before us that the ruling was erroneous.

1. Speaking on this subject, a standard writer on the law of evidence says: "So, where a witness is called to contradict another, who had stated that such and such expressions were used, or the like, counsel are sometimes permitted to ask whether those particular expressions were used, or those

things said, instead of asking the witness to state what was said." (1 Greenl. on Ev., § 435.) To the same effect is the text of another high authority on this point: "The witness having been asked on cross-examination if he had not used particular expressions, in order to lay a foundation for contradicting him, upon his denial, the witness called to prove that he did use them may be asked as to the particular words used from his brief." (Stark. Ev. 216.)

In *Edwards v. Walter*, 3 Stark. 8, "Scarlett, in cross-examination, asked a witness as to some expressions he had made, for the purpose of laying a foundation for contradicting him; the witness denied having used them. Scarlett afterwards called a person to prove that he had, and read from his brief. Abbott, C. J., held that he was entitled to do so."

The impeaching witness was the Chinese interpreter, and he was the proper person to call for the purpose of proving what the defendant swore to in the Chinese language on the former trial, as was held by Department One of this Court in the case of *The People v. Ah Yute*, 56 Cal. 121. "The interpreter or some other witness who heard and understood the language in which the statements of the defendant were made, should have been called to prove them." (See also *People v. Lee Fat*, 54 Id. 527.)

2. The second point made, presents an exception to remarks made by the District Attorney in his closing argument to the jury; and upon this subject the bill of exceptions shows the following facts:

"Mr. Marshall said, in closing for the people, an attempt has been made to impeach the character of the witness for the people, Hugo Habner. Counsel for the defense has attacked him in a bitter tirade. He is a man of good character, and had I deemed it necessary I could have produced witnesses to testify to his good character;" to which remarks the defendant objected, and had his exception noted. Thereupon the following additional occurred:

"The Court: It has been sought here to try the case without any exceptions; and rather than there should be any exception, the Court will order the remarks of Mr. Marshall stricken out—those which were objected to;" whereupon Mr. Marshall said: "Very well, then, the argument, so far as

making any indorsement of that man's character, goes for nothing—so far, I suppose, as I stated I was prepared to defend his reputation if it has been impeached." The Judge then said: "Yes, strike that out also."

In the case of *The People v. Runk*, decided January 22, 1878, the Supreme Court had before it the question of alleged improper remarks made by the District Attorney in his closing argument to the jury, and such remarks were made the ground of exception on appeal. The Court affirmed the judgment, but filed no written opinion. The affirmance of the judgment, however, involved the decision that the case should not be reversed, because the District Attorney went out of the record, and presented views of his own in the case. The recent case of *The People v. Barnhart*, 59 Cal. 402, presented a similar question, and Mr. Justice Ross, delivering the opinion of the Court, there says: "We see no merit in the exception. An erroneous statement of the testimony to the jury by counsel in the trial of a cause, is not an error for which a new trial will be awarded. It would be strange if it was." Few cases would stand the test of an appeal, if the Court below is to be held responsible for every license taken by attorneys in the argument of causes. We do not wish to be understood as saying that there may not be such an abuse in this regard, as would make it the duty of this Court to reverse the judgment of the trial court, but certainly there was nothing in the case with which we are now dealing that calls for a reversal. Objection was made by defendant's counsel to the remarks made by the District Attorney, and the Court below at once ordered them stricken out. They did not occur again in the argument, and the Court did all in its power to remove any improper influence the remarks might have produced upon the jury.

We see no error in the proceedings, and the judgment and order are therefore affirmed.

McKEE, ROSS, SHARPSTEIN, and THORNTON, JJ., concurred.

CAL. REFS. LX—7

[No. 8,126.—Department One.]

Feb. 27, 1882.

L. NESSLER ET AL. *v.* ORSON BIGELOW.

PATENT — MINERAL LANDS — STATUTE OF LIMITATIONS — CONSTRUCTIVE TRUST.—Action to quiet title. The plaintiff deraigned title under a patent of the United States issued within five years of the commencement of the action. The defendants pleaded title by the statute of limitations; and also facts which they contended constituted the plaintiff trustee for them of the title; but on this issue the Court found against them.

Held, as to the latter defense, that the finding was justified by the evidence, and as to the former that the statutes could not avail the defendants against the patentee.

APPEAL from the judgment for the plaintiff and from an order denying a new trial in the Superior Court of the County of Sierra. *HOWE, J.*

Gale and Jones, for Appellants.

It is a part of the history of this State that, in the mining section one party may own and occupy the surface of land for building and agricultural purposes, while another may own and occupy the same land for mining purposes. It is a fact that a majority of the villages and towns in Sierra County (in which the premises in dispute are situated) are located upon mineral land, owned and used by others than the owners of the surface, and the improvements thereon. Until about two years ago, when the inhabitants of Downieville availed themselves of the town site acts, the whole of that town, including the Court House and other public buildings, was built upon mining claims owned and worked by miners, who made no claim to the buildings and improvements on the surface. Great and important property rights of this character, amounting in value to millions of dollars, have grown up, and have always been protected in this State.

Now, inasmuch as the officers of the Land Department have from the beginning, and still do refuse to hear or determine any adverse claims, except as between adverse claimants for mining purposes only, and as the owners of the improvements upon the surface—no matter how valuable—have no standing in the Land Office, it follows that the mining claim-

ant can obtain a patent to the land. Query—Does the holder of a patent obtained under such circumstances acquire an absolute right to the valuable improvements and homes of those who up to the issuance of the patent owned and occupied the surface? Under the recent decisions of this Court and of the United States Supreme Court, we say that he does not, but, on the contrary, having obtained a legal title to the property of another, he holds it in trust for him. (*Atherton v. Fowler*, 96 U. S. 519; *Hosmer v. Wallace*, Id. 597; *Trenouth v. San Francisco*, Id. 180; *Davis v. Scott*, 6 P. C. L. J. 699; *Hosmer v. Duggan*, Id. 615.)

The above question is involved in this case, and the appellants endeavored in vain to have the Court below find upon the issues raised by the pleadings and determine their rights. The respondent claims a quartz ledge with two hundred and fifty feet of land on each side thereof. The ledge is in the bedrock and beneath the surface. The appellants (except Nessler, who claims only an easement) for many years resided on and cultivated the small tracts claimed by them, and held the same peaceably and adversely, and as against the respondent, they had the better right, at least up to the time plaintiff obtained his patent. The tracts claimed by appellants are within the lines of respondent's claim, but have never interfered with the working of the ledge.

The respondent applied for a patent, and as the appellants made no claim to any part of the land for mining purposes, they could not file any adverse claim, or contest the claim of respondent in the Land Office, and in due time he obtained a patent pursuant to the Mining Acts of Congress, and under it he claims the homes and improvements of appellants.

Our third point is that the Court refused to find upon the most important issue, viz., as to our adverse possession. It is true it finds that there has been no adverse possession since the date of the patent. Now, we claim that we built upon and inclosed the tracts we now claim, and for more than five years before plaintiff had any right to the land he now claims under his patent, we had cultivated and used the same peaceably and adversely to all. In other words, we were entitled to the possession as against all the world, except the United States, at the time plaintiff obtained his patent. The Court

refused to find on this all-important point further than to say, against the admissions of the pleadings and the evidence, that we did not hold adversely after the date of the patent.

The Court ignored the very point on which defendants relied, viz.: Did we by reason of prior appropriation or adverse possession have a better right to the premises claimed up to and at the time plaintiff applied for a patent? Had the Court found, for instance, that our possession was of such a character that in an action between the parties at any time before his application for a patent, the defendants would be entitled to recover; then the legal question which we attempted to raise, and on which we rely, viz., What was the effect of the patent upon our rights? would be fairly before the Court.

In conclusion, we will add that the defendants, like thousands of others, had settled upon and built themselves homes on small tracts of the public mineral domain. It was done under the acquiescence and encouragement of the Government. Such rights the Government is in honor bound to respect, and, as we believe, will respect.

It never was intended that one man should reap the fruits of another's labor. It may be true that, because small tracts of mineral land are occupied as homes, it should not prevent the Government from disposing of its mineral lands; but, under the familiar rule in equity, where one party acquires the legal title to property in which there is an interest, paid for, created, and owned by another, he will hold the title in trust for such other party to the extent of his interest; we think the rights of all concerned in cases like this can be respected and protected by the Courts.

M. Farley, for Respondent.

Defendants, who had full notice of plaintiff's application for patent, should have availed themselves of their right to make an adverse claim in the United States Land Office (defendants admit there was no fraud in plaintiff's action in obtaining his patent, and no promises made them).

Defendants should have put in their adverse claim before the Land Office.

One party can not hold another as trustee, when he has

failed to comply with all the provisions of the law on which he bases his claims, unless he was prevented by plaintiff by some unfair means from so doing. He must show that he possessed all the qualifications, performed all the acts, and complied with all the conditions required by law to entitle him to pre-empt, or to hold, or to locate, and that he proved these facts by competent testimony at a trial in the Land Office. Defendant did none of these.

The defendants in this action are in no privity with the United States; and possess no claim, legal or equitable, to the lands they claim. The proffered offer of the Government to protect them if they put in an adverse claim, according to Sections 2325-2326, of the Revised Statutes, has never been accepted by them. (*Doll v. Meador*, 16 Cal. 326.)

It was not necessary for the Court to find on the question of defendant's adverse possession prior to plaintiff's patent; the Court found, they failed to put in any adverse claim to plaintiff's application for a patent, and that they were not induced to refrain from so doing by plaintiff in any way, and that was all that was necessary.

Ross, J.:

Action to quiet title—plaintiff relying on a patent from the Government, issued March 30, 1876, under and by virtue of the mining laws. In their answer the defendants admit that they, respectively, claimed interests in certain separate and distinct portions of the premises embraced in the patent, adverse to the plaintiff; and aver, that for more than fifteen years immediately preceding the commencement of the action, they had, respectively, held the adverse possession of the respective portions so claimed. But they could not have held adversely to the Government, and the action having been commenced within five years after the issuance of the patent, the statute of limitations could not avail them against the patentee.

In their answer, the defendants affirmatively aver that the plaintiff's patent was duly obtained, and that they had notice of his application to purchase the land, but charge, that for the purpose of preventing the defendants from contesting the plaintiff's application to purchase the premises, he, plaintiff,

fraudulently represented to them, and each of them, that he only wanted the premises for mining purposes, and that he would never disturb their respective possessions; that the title he should acquire should inure to their benefit so far as their respective tracts were concerned, and that on obtaining the patent he would convey such title to them; that relying upon these representations, the defendants took no steps to prevent the plaintiff from acquiring the legal title to the whole of the premises, but that they continued to reside upon, and at great expense to improve the respective portions claimed by them, with the full knowledge, acquiescence, consent, and approval of the plaintiff, until shortly before the commencement of this action, when the plaintiff for the first time refused to recognize any right on the part of defendants; that nearly the entire value of the premises claimed by the defendants consists in the improvements made by them; that defendants have at all times been, and now are, ready and willing and able to pay to plaintiff their just and proportionate share of the costs and expenses incurred by him in obtaining the patent, etc.

Issues of the fact were raised by the plaintiff on the matters thus set up by the defendants, and which they contended constituted the plaintiff trustee for them of the title to the respective portions of the premises claimed by them, which issues were found upon by the trial Court against the defendants, on evidence which clearly justified the findings.

Indeed, we find in the statement on motion for a new trial the following: "The defendants all *admit* that the plaintiff never at any time made to them any promises to make deeds or deed to them if they would not put in an adverse claim to his application for a patent, and that he never held out any inducements to them to prevent them from putting in adverse claims and opposing his application for a patent."

The other assignments of error we have examined, but do not find that any of them call for an interference at our hands with the action of the Court below.

Judgment and order affirmed.

MYRICK and MCKINSTRY, JJ., concurred.

[No. 10,722.—Department One.]

Feb. 28, 1882.

EX PARTE NOBLE WALLINGFORD.

JURISDICTION—MISDEMEANOR—PETIT LARCENY—SUPERIOR COURT—JUSTICE'S COURT—CONSTITUTIONAL LAW.—The Superior Court has no jurisdiction of cases of petit larceny, or such other misdemeanors, as have been committed by the Legislature to the Justice's Court.

APPLICATION for discharge upon writ of *habeas corpus*. The petitioner was held under a bench warrant, issued upon an indictment for petit larceny, in the Superior Court of the County of Napa.

Charles B. Darwin, for Petitioner.

ROSS, J.:

The provisions of law, constitutional as well as statutory, to be considered in this case are very different from those considered in *Ex parte McCarthy*, 53 Cal. 412, which case arose prior to the adoption of the Constitution of 1879.

The question is, has the Superior Court jurisdiction of the crime of petit larceny? The jurisdiction of that Court is fixed by the Constitution itself. (§ 5, Art. vi.). With respect to criminal matters, it is given jurisdiction of "all criminal cases amounting to felony, and cases of misdemeanor, not otherwise provided for."

Of course the Legislature can not take from the jurisdiction conferred by the Constitution on the Superior Court, except as expressly permitted by the Constitution itself. With respect to *misdemeanors*, however, the Constitution authorizes the Legislature to take from that jurisdiction; for, as already observed, it gives to the Superior Court jurisdiction in "cases of misdemeanor *not otherwise provided for*," and follows that provision with another—Section 11 of Article vi—giving the Legislature the power to establish Justices' Courts and to "fix by law the powers, duties, and responsibilities" thereof; *provided*, such powers shall not in any case trench upon the jurisdiction of the several Courts of record, except that said Justices shall have concurrent jurisdiction with the Superior Court in certain cases of forc-

ble entry and detainer, and in certain cases to enforce and foreclose liens on personal property.

It is thus seen that by the express terms of the Constitution, the Legislature is empowered to establish Justices' Courts, and to confer upon them such powers as to it shall seem proper, provided such powers shall not in any case trench upon the jurisdiction of the several Courts of record, with the exceptions already noticed. The limitation as to trenching upon the jurisdiction of the several Courts of record obviously refers to the jurisdiction conferred upon those Courts by the Constitution itself. For example, as the Constitution confers upon the Superior Court jurisdiction in all cases of felony, the Legislature could not confer on the Justice's Court jurisdiction in such a case. But while the Constitution also confers on the Superior Court jurisdiction in cases of misdemeanor, it is of misdemeanors that are *not otherwise provided for*. When the Legislature, pursuant to the power conferred by Section 11 of Article vi, "to otherwise provide for" certain, or all misdemeanors, *does* otherwise provide for certain of them, and confers upon the Justice's Court jurisdiction in certain cases of misdemeanor, the jurisdiction so conferred becomes exclusive, for they then become cases of misdemeanor "*otherwise provided for*," over which, according to the express language of the Constitution, the Superior Court has no jurisdiction.

This being, as we conceive, the true interpretation of the provisions of the Constitution bearing on the subject, it results that the Superior Court has lost jurisdiction of the crime of petit larceny, since the Legislature has, by Section 115 of the Code of Procedure (Newmark's ed.), conferred on the Justice's Court jurisdiction of that, together with other misdemeanors. Whether or not there are any misdemeanors included within the provisions of Section 115 which are required by the provisions of the Constitution to be prosecuted by indictment or information need not be determined in this case. But it is clear that there is nothing in the Constitution which prohibits the Legislature from requiring the crime of petit larceny to be otherwise prosecuted. Section 8 of Article i of the present Constitution declares: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by

information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be provided by law. * * *

And, looking back to the Constitution of 1863, we see how offenses were "heretofore" required to be prosecuted. "No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land and naval forces in time of war, or which this State may keep, with the consent of Congress, in time of peace, and in cases of *petit larceny, under the regulation of the Legislature*), unless on presentment or indictment of a Grand Jury. * * *" (Section 8, Article i, Const. 1863.)

It will be thus seen that cases of *petit larceny* are expressly excepted from the constitutional provision prescribing the mode of prosecution, and are left to the regulation of the Legislature.

By Section 1426 of the Penal Code, the Legislature has declared that all proceedings before a Justice's Court for a public offense, of which such Courts have jurisdiction, must be commenced by *complaint* under oath, setting forth the offense charged, with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the nature of the offense complained of, and to answer the complaint. The next section provides that if the Justice is satisfied from the complaint that the offense complained of has been committed, he must issue a warrant for the arrest of the party charged; and Section 1429 provides that the defendant may plead to the complaint as upon an indictment.

We have not omitted to notice that the Legislature has also provided, by Section 915 of the Penal Code, that "the Grand Jury must inquire into all public offenses committed or triable within the county, and present them to the Court, either by presentment or indictment;" and by Section 976 of the same Code, that "when the indictment or information is filed, the defendant must be arraigned thereon before the Court in which it is filed, unless the cause is transferred to some other county for trial." By this last section, it is contended on behalf of the respondent, the Legislature has specifically declared that all offenses, when prosecuted by indict-

ment, must be tried in the Court where the indictment is found (that is to say, the Superior Court), unless the cause is transferred to some other county for trial; from which, it is claimed, it "follows that this offense (petit larceny), when prosecuted by indictment, is a 'case of misdemeanor not otherwise provided for,' and is therefore within the jurisdiction of the Superior Court."

But counsel entirely overlook the all-important fact that the jurisdiction of the offense is not determined by the *form of procedure* by which it is prosecuted, but by the *nature of the offense itself*. And since, as already shown, the Superior Court has no jurisdiction of such misdemeanors as have been committed by the Legislature to the Justice's Court, and since the Legislature has committed to the last-named Court all cases of petit larceny, a conclusion quite the reverse of that drawn by respondent's counsel would seem to follow from Section 976 of the Penal Code.

But however that may be, the Legislature has, by Section 1426, *supra*, in terms declared that all proceedings before a Justice's Court for an offense of which such Courts have jurisdiction, must be commenced by *complaint under oath*; and so far at least as petit larceny is concerned, there is not any constitutional objection to that provision. That some further legislation is necessary in order to bring the various provisions of the statute relating to prosecutions for criminal offenses into harmony with each other and into conformity with the present Constitution, is apparent, but reading them together and in the light of the provisions of the Constitution, we have no difficulty in holding, as we do, that the indictment charging the petitioner with the crime of petit larceny is unauthorized by law, and that he is entitled to be discharged from custody under it.

Ordered accordingly.

MCKINSTRY, J. and MORRISON, C. J., concurred.

[No. 10,703.—In Bank.]

Feb. 28, 1882.

THE PEOPLE v. LEONG QUONG ET AL.

LARCENY—VARIANCE AS TO OWNERSHIP OF PROPERTY—NAME.—The appellants were convicted of the crime of grand larceny, for stealing a horse and wagon, the alleged property of one Sang Hop. On the trial of the case the owner of the property stolen testified that he had two names—a business name and a personal one. His personal name was Yup Chin, and his business name Sang Hop; and that in all his business transactions and dealings, for years, he has been known by his business name only.

Held: The name of the owner of property stolen is not a material part of the offense charged. It is only required to identify the transaction, so that the defendant, by proper plea, may protect himself against another prosecution for the same offense. The owner may have a name by reputation, and if it is proved that he is better known by that name than any other, the charge in the information by that name is sufficient.

APPEAL from a judgment of conviction, and from an order denying a new trial in the Superior Court of the City and County of San Francisco. FERRAL, J.

Thomas F. Barry, for Appellants.

No brief on file for Respondent.

MCKEE, J.:

The appellants, in this case, were convicted in the Court below of the crime of grand larceny, for stealing a horse and wagon, the alleged property of one Sang Hop. The commission of the offense was proved by unquestioned evidence. No exception is taken to the charge of the Court to the jury, but it is contended that the verdict is contrary to law, because of a variance between the information and evidence as to the name of the injured party.

On the trial of the case the owner of the property stolen testified that he had two names—a business name and a personal one. His personal name was Yup Chin, and his business name Sang Hop; and that in all his business transactions and dealings, for years, he has been known by his business name only.

The name of a person is the designation by which he is known. As, therefore, the owner of the property was known

by the name of Sang Hop, that name was sufficient, in legal proceedings, whether he had another name or not. As is said by the Supreme Court of Massachusetts: "The name which was given to a person at the time he was baptized is to be taken as originally, and presumed to continue his name; but if after his baptism he adopts and uses another name by which he is subsequently well known in the community where he resides, prior to and at the time of the alleged sale, it is sufficient if he is described by that name in the complaint." (*Commonwealth v. Trainor*, 123 Mass. 415.) The name of the owner of property stolen is not a material part of the offense charged. It is only required to identify the transaction, so that the defendant, by proper plea, may protect himself against another prosecution for the same offense. The owner may have a name by reputation, and if it is proved that he is better known by that name than any other, the charge in the information by that name is sufficient. (*The State v. Bell*, 65 N. C. 314.)

There was, therefore, no variance between the information and proof in the case which affected any substantial right of the defendant. (*People v. Hughes*, 41 Cal. 236.)

Judgment and order affirmed.

MORRISON, C. J., and ROSS, MYRICK, THORNTON, and SHARPSTEIN, JJ., concurred.

[No. 10,720.—In Bank.]

Feb. 28, 1882.

THE PEOPLE v. CHARLES GILBERT.

ROBBERY—VERDICT.—Upon the trial of an information for robbery, the verdict was as follows: "We, the jury, find the defendant guilty as charged in the information;" and it was claimed that the crime of robbery charged in the information, also involved the crime of grand larceny, of which it was within the power of the jury to find the defendant guilty, and that the verdict should have specified which of these two crimes, robbery or grand larceny, the defendant was found guilty of.

Held: It is no argument against the sufficiency of the verdict in this case, that robbery includes larceny, and that under an indictment and prosecution for the former, a defendant may be convicted of the latter crime.

The jury in this case has found the defendant guilty as charged in the indictment, and the charge in the indictment is the crime of robbery; and we do not, therefore, discover any uncertainty in the verdict.

ID.—INSTRUCTION—RELEVANCY OF INSTRUCTIONS—REASONABLE DOUBT—CIRCUMSTANTIAL EVIDENCE—HYPOTHESIS—DEFINITION.—The Court refused to give the eighth instruction asked by defendant, which was as follows: "The hypothesis contended for by the prosecution must be established to an absolute moral certainty, to the entire exclusion of any rational probability of any other hypothesis being true, or the jury must find the defendant not guilty"—the refusal being placed upon the ground that "this is not a case of circumstantial evidence, and the instruction is not responsive to the testimony in the case." The evidence given was that of the party robbed, and was direct and positive, and not circumstantial.

Held: Where all the evidence in the case is direct and positive, and the defendant's guilt is in no manner dependent upon an agreement of circumstances, there is no such thing as a hypothesis, in the theory of the prosecution, and an instruction based upon such a theory becomes irrelevant and immaterial. There was nothing in the case to warrant such an instruction, and therefore it was proper for the Court to refuse it.

ID.—ID.—ID.—ID.—ID.—ID.—ID.—When there is no statement or bill of exceptions embodying the evidence or declaring its purport and tendency, the appellate Court will presume in favor of the correctness of the charge of the Judge to the jury, unless the charge is manifestly erroneous under any and every conceivable state of facts.

ID.—ID.—ID.—ID.—ID.—The Court refused to give the following instruction asked by defendant: "In order to convict the defendant upon evidence of circumstances, it is necessary, not only that all the circumstances concur to show that he committed the crime charged, but that they are inconsistent with any other rational conclusion. It is not sufficient that the circumstances proved coincide with, account for, and therefore render probable the hypothesis sought to be established by the prosecution, but they must exclude to a moral certainty every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty."

Held: What has been said in reference to instruction eight is equally applicable to this one. It may be conceded that the instruction embodied the correct rule with respect to circumstantial evidence; but as there was no such evidence in the case, it was but the statement of an abstract principle of law, upon which it was in no sense the duty of the Court to charge the jury.

APPEAL from a judgment of conviction in the Superior Court of the County of Tehama. **KEYSER, J.**

Charles A. Garter, for Appellant.

A. L. Hart, Attorney General, for Respondent.

MORRISON, C. J.:

The defendant was prosecuted in the Superior Court of Tehama county for the crime of robbery, and having been convicted of that crime, appealed to this Court, and asks a reversal of the judgment of the Court below on three grounds, which we proceed to examine.

1. The first objection is to the verdict, which is as follows; "We, the jury, find the defendant guilty as charged in the information." It is claimed that the crime of robbery charged in the information also involved the crime of grand larceny, of which it was within the power of the jury to find the defendant guilty, and that the verdict should have specified which of these two crimes, robbery or grand larceny, the defendant was found guilty of. In support of this proposition cases have been referred to, which do not in our opinion sustain the views taken by appellant's counsel.

In the case of *The People v. Coch*, 53 Cal. 627, the defendant was indicted for arson, and the verdict was "guilty as charged in the indictment." The Court held that the verdict was too general, as it should have found the degree of crime of which the defendant was found guilty. The case of *The People v. Campbell*, 40 id. 129, was a trial for murder, and the verdict was a general one, as in the other case above cited. It was held too general. But arson and murder are divided by the Code into degrees, and by Section 1157 of the Penal Code it is provided, that "whenever a crime is distinguishable into degrees, the jury, if they convict the defendant, must find the degree of crime of which he is guilty." Hence the cases in 40 and 53 Cal. simply carry out the provision of the Code. But with respect to robbery, the rule above laid down has no application, because the crime of robbery is not divided into degrees. In other words, there is but one degree of that crime: "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence and against his will, accomplished by means of force or fear," and the punishment prescribed for robbery is found in Section 213 of the same Code: "Robbery is punishable by imprisonment in the State Prison not less than one year."

It is no argument against the sufficiency of the verdict in this case that robbery includes larceny, and that under an indictment and prosecution for the former, a defendant may be convicted of the latter crime. The jury in this case has found the defendant guilty as charged in the indictment, and the charge in the indictment is the crime of robbery; and we do not, therefore, discover any uncertainty in the verdict. If the jury had intended to convict of larceny, they would have said: "We, the jury, find the defendant guilty of larceny."

2. The second alleged error is predicated upon the refusal of the Court to give the eighth instruction asked by the defendant, which was the following:

"The hypothesis contended for by the prosecution must be established to an absolute moral certainty, to the entire exclusion of any rational probability of any other hypothesis being true, or the jury must find the defendant not guilty."

In cases in which the evidence is circumstantial, the foregoing instruction is usually asked and given; but it was refused in the present case, because, as was stated by the learned Judge, "this is not a case of circumstantial evidence, and the instruction is not responsive to the testimony in the case." The evidence given was that of the party robbed, and was direct and positive, and not circumstantial.

A hypothesis is a supposition; a proposition or principle which is supposed or taken for granted, in order to draw a conclusion or inference for proof of the point in question; something not proved, but assumed for the purpose of argument. (Webster's Dict.) Where all the evidence in the case is direct and positive, and the defendant's guilt is in no manner dependent upon an agreement of circumstances, there is no such thing as a hypothesis in the theory of the prosecution, and an instruction based upon such a theory becomes irrelevant and immaterial. From these premises the conclusion is natural and irresistible that there was nothing in the case to warrant such an instruction, and, therefore, it was proper for the Court to refuse it. "Instructions are always to be given with reference to the fact proved before the jury." (*People v. Byrnes*, 30 Cal. 207; *People v. King*, 27 id. 507.)

The evidence in the case is not brought upon this appeal,

and when there is "no statement or bill of exceptions embodying the evidence, or declaring its purport and tendency, the appellate Court will presume in favor of the correctness of the charge of the Judge to the jury, unless the charge is manifestly erroneous under any and every conceivable state of facts." (*People v. King, supra.*) This rule is based upon the doctrine that the party who alleges error must show it: "That the instruction objected to was badly drawn and may possibly have been erroneous may be admitted. Still, if any state of facts might have been found in view of which it would be proper, then we must suppose that that state of facts was proved, and that the defendant was not prejudiced. The rule is that judgments will be reversed for alleged errors in instructions only when, looking at the testimony, we can see that the jury may have been misled by them to the prejudice of the defendant, or when, in the absence of the testimony, it is apparent that the instructions would be improper under any possible condition of the evidence." (*People v. Donahue*, 45 Cal. 321.) The converse of the proposition is, that when an instruction is refused on the ground that there is no evidence in the case to support it (as was done here), the party complaining must show that there was evidence which rendered the instruction relevant and proper.

3. The third alleged error arises out of the refusal of the Superior Court to give the following instruction to the jury:

"In order to convict the defendant upon evidence of circumstances, it is necessary, not only that all the circumstances concur to show that he committed the crime charged, but that they are inconsistent with any other rational conclusion. It is not sufficient that the circumstances proved coincide with, account for, and, therefore, render probable the hypothesis sought to be established by the prosecution, but they must exclude to a moral certainty every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty."

The instruction is marked "refused because this is not a case of circumstantial evidence." What has been said in reference to instruction eight is equally applicable to this one. It may be conceded that the instruction embodied the correct rule with respect to circumstantial evidence; but as there was

no such evidence in the case, it was but the statement of an abstract principle of law, upon which it was in no sense the duty of the Court to charge the jury. In addition to what has already been said by us, it may be remarked that the Court charged the jury upon the question of reasonable doubt, and by such charge they were fully informed and advised that all the facts in the case, material to the defendant's guilt, must be established by the prosecution to the entire satisfaction of the jury, and beyond a reasonable doubt.

We see no error in the case, and the judgment is therefore affirmed.

MYRICK, ROSS, MCKEE, SHARPSTEIN, and THORNTON, JJ., concurred.

[No. 10,697.—Department Two.]

March 1, 1882.

THE PEOPLE v. I. S. KALLOCH ET AL.

INDICTMENT—MISDEMEANOR—MISCONDUCT IN OFFICE—NEW CITY HALL COMMISSIONERS—APPEAL—JURISDICTION OF SUPREME COURT.—The defendants, as New City Hall Commissioners for the City and County of San Francisco, were indicted for misconduct in office: *Held*, This Court has jurisdiction of the appeal.

ID.—ID.—ID.—ID.—*Held further*, The indictment is fatally defective.

APPEAL from a judgment for defendants on demurrer, in the Superior Court of the City and County of San Francisco. FREELON, J.

The indictment was as follows:

"The People of the State of California against Isaac S. Kalloch, John P. Dunn, and John Luttrell Murphy, in the Superior Court of the City and County of San Francisco, State of California, the fifth day of November, A. D. 1880. Isaac S. Kalloch, John P. Dunn, and John Luttrell Murphy are accused by the Grand Jury of the said City and County of San Francisco, by this indictment, of the crime of misdemeanor, committed as follows: During the months of February, March, April, May, and June, A. D. 1880, the said Isaac

1. *People v. Markham*, 64 Cal. 162.

S. Kalloch was the Mayor, the said John P. Dunn was the Auditor, and the said John Luttrell Murphy was the City and County Attorney of the said City and County of San Francisco; and during the months last mentioned the said defendants, by virtue of their said respective offices, constituted the board known as the Board of New City Hall Commissioners for the City and County of San Francisco; that according to the Act of the Legislature of California, entitled 'An Act to provide for the completion of the building in the City and County of San Francisco, known as the New City Hall,' approved March 24, 1876, it was the duty of the said Commissioners to advertise for sealed proposals for work to be done upon the said building. Nevertheless, during the said months of February, March, April, May, and June, A. D. 1880, at the City and County of San Francisco, upon the building aforesaid, they, the said defendants, as Commissioners aforesaid, had a large amount of concrete work done without advertising for sealed proposals to do the same; and the omission of the said defendants, as Commissioners aforesaid, to make such advertisement was willful, and contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California.

D. L. SMOOT,
"District Attorney"

D. L. Smoot, for Appellant.

McClure, Dwinelle & Plaisance, for Respondent Kalloch.

We have no provision by which an appeal can be perfected in this Court in criminal cases of less degree than felony; the provisions of the Penal Code regarding such appeals have no application to misdemeanors. (§ 1235 *et seq.*) No provision is made for such an appeal, other than by Section 4 of Article vi of the new Constitution, which only gives the appellate jurisdiction. This provision is not self-acting, and no appeal can be perfected thereunder, until the machinery is provided therefor by the Legislature; nor can the proceedings of the Court below be reviewed by this Court, except possibly, on writ of error, as suggested in *Ex parte Thistleton*, 52 Cal. 220.

Garber, Thornton & Bishop, for Respondent Dunn.

The COURT:

This Court has jurisdiction of the appeal. (Const., Art. vi, § 4; C. C. P., § 52.)

The indictment is fatally defective in at least two particulars: 1. It does not charge that the act complained of was done by the defendants as a "Board;" and, 2. It does not give the name of the party with whom the contract was made.

We think the demurrer was properly sustained, and the judgment is affirmed.

[No. 10,698.—Department Two.]

March 1, 1882.

THE PEOPLE v. KALLOCH.

The COURT:

This case is like case 10,697, *supra* (same parties), and the judgment is affirmed on the authority of the opinion filed in the latter case.

[No. 10,699.—Department Two.]

March 1, 1882.

THE PEOPLE v. KALLOCH.

The COURT:

Judgment affirmed on the authority of case No. 10,697, *supra* (same parties).

[No. 10,700.—Department Two.]

March 1, 1882.

THE PEOPLE v. KALLOCH.

The COURT:

The judgment in this case is affirmed on the authority of case No. 10,697, *supra* (same title).

[No. 10,701.—Department Two.]

March 1, 1882.

THE PEOPLE v. ISAAC S. KALLOCH

INDICTMENT.—MISCONDUCT IN OFFICE.—The indictment in effect charged the defendant, who was Mayor of the City and County of San Francisco, with having corruptly received from a city official a part of his salary, which salary had been increased by the influence of defendant; but did not charge him with having received any reward or promise thereof as an inducement to his official action.

Held: The act charged did not constitute a violation of Section 70 of the Penal Code.

APPEAL from a judgment for defendant on demurrer in the Superior Court of the City and County of San Francisco.
FRELON, J.

D. L. Smoot, District Attorney, for Appellant.

McClure, Dwinelle & Plaisance, for Respondent.

The COURT:

The indictment charges that, at a time therein stated, the defendant was the Mayor of the City and County of San Francisco, and, by virtue of that office, was the President of the Board of Election Commissioners of said city and county. That the defendant, in his official capacity, procured the appointment of one W. P. Hughey to a position in the office of the Registrar of voters, at a salary of seventy-five dollars per month, and afterwards caused the salary of said Hughey to be increased to the sum of one hundred and twenty-five dollars per month. "That on the twenty-second day of March, 1880, the said Isaac S. Kalloch, at the city and county aforesaid, for the purpose of inducing the said W. P. Hughey to deliver a portion of his salary against his will, and without lawful consideration to him, he, the said Isaac S. Kalloch, then and theretofore well knowing that the said W. P. Hughey knew him, the said Isaac S. Kalloch, to be the Mayor of the said city and county, and, by virtue thereof, a member and the President of the said Board of Election Commissioners, corruptly stated and declared to the said W. P. Hughey that he, the said Isaac S. Kalloch, had had his, the said W. P. Hughey's, salary raised, and that he, the said Isaac S. Kalloch,

wanted fifty dollars out of the salary of him, the said W. P. Hughey, for the month of March, A. D. 1880, and that he wanted it for a man who needed it worse than the said W. P. Hughey. That afterwards, to wit, on the twenty-eighth day of March, A. D. 1880, the said Isaac S. Kalloch again corruptly demanded the said sum of fifty dollars from the said W. P. Hughey, and continued to demand and apply for the same, until moved and influenced by the said demands made as aforesaid, it was paid by the said W. P. Hughey to, and corruptly received by him, the said Isaac S. Kalloch, in the following manner, viz., ten dollars on or about April, 2, A. D. 1880, and the remaining forty dollars on or about May 1, A. D. 1880."

The indictment was demurred to on the ground that it did not state any public offense, and the Court below having sustained the demurrer, an appeal has been taken to this Court, on behalf of the people.

It is claimed by the prosecution that the indictment charges a crime under Section 70 of the Penal Code; and that section reads as follows: "Every executive or ministerial officer, who knowingly asks or receives any emolument, gratuity, or reward, or *any promise thereof*, excepting such as may be authorized by law, for *doing* any official act, is guilty of a misdemeanor."

It will be remarked that it is as much a violation of the law to ask or receive a *promise of a reward* as it is to actually receive the reward; and the obvious intent of the statute was to prevent any improper influences being brought to bear upon official action. But the indictment in this case does not charge the defendant with having received any reward or *promise thereof*, as an *inducement* to his official action, but it simply charges him with having corruptly received from a city official a part of his salary, which salary had been increased by the influence of defendant.

With the *morality* of such official conduct we have nothing to do, and we are simply called upon to determine whether the act of the defendant violates the section of the Penal Code, a copy of which is set forth above. We are of the opinion that it does not, and therefore the demurrer was properly sustained.

Judgment affirmed.

[No. 10,655.—In Bank.]

March 1, 1882.

THE PEOPLE v. TIBURCIO CASTRO.

RAPE—SUFFICIENCY OF EVIDENCE.

APPEAL from a judgment of conviction, and from an order denying a new trial in the Superior Court of the County of Sierra. HOWE, J.

Stanley A. Smith, for Appellant.

A. L. Hart, Attorney General, for Respondent.

The COURT:

The defendant was convicted in the Court below of the crime of rape, alleged to have been committed upon a child of the age of eleven years. We have carefully examined the evidence in the case, and are of the opinion that it was insufficient to justify the verdict of guilty. (*People v. Benson*, 6 Cal. 221; *People v. Hamilton*, 46 id. 540; *People v. Ardaga and Gamez*, 51 id. 371.)

The judgment and order are reversed, and cause remanded for a new trial.

[No. 8,118.—Department Two.]

March 1, 1882.

JAMES F. CUNNINGHAM v. J. W. SHANKLIN.

STATE LANDS — CONTEST — JURISDICTION — SURVEYOR GENERAL — APPLICATION TO PURCHASE UNDER AMENDATORY ACT OF APRIL —, 1870 — JUDGMENT.—After judgment has been entered in an action upon a reference of a contest by the Surveyor General to determine the right of contestants to purchase State lands, it is the duty of the Surveyor-General to obey the judgment, and mandamus will lie to compel him. So held in a case where the jurisdiction of the District Court was called in question, on the ground that the amendatory Act of April, 1870—under which the plaintiff's application was made—was void.

Id.—Id.—Id.—ESTOPPEL.—In such case the State and its officers are estopped from selling the same land to an applicant who filed his claim pending the action or subsequent thereto; and the reception and filing of such an application does not create such a contest as to authorize a reference to the Court under Section 3314, Political Code.

APPLICATION for writ of mandamus.

J. H. McKune, for Plaintiff.

An application to purchase land of the Government (State or National), subject to sale made in form by one competent to purchase, gives such applicant a substantial right, and such right as to lands subject to sale by the State, is by statute made the subject of a civil action between contesting claimants. (Pol. C., § 3414.)

The State by its statutes has provided the reference to the Court as the only means to determine the right to purchase, and the judgment of the Court in favor of Cunningham bound the State with its officers and all others. (*Laugenour v. Shanklin*, 57 Cal. 70.)

The statute contemplates that where the matter is so referred to the Courts, the further application shall not be received by the Surveyor General, and that where the sentence of Court on the question has been pronounced, the Surveyor General shall act in accordance therewith.

When the sovereign power confides to a tribunal a right to sell lands, and to determine between purchasers who has the better right, this power is exclusive and its determinations conclusive, not only on the parties claiming the right to purchase, but on the seller. (*Marquez v. Frisbie*, 41 Cal. 624; *Burrell v. Haw*, 48 id. 222; *Wilkinson v. Merrill*, 52 id. 426; *Laugenour v. Shanklin*, *supra*; *United States v. Throckmorton*, 98 U. S. 61; *Moll v. Merrill*, Jan. 24, 1881; *Wilkinson v. Merrill*, Jan. 24, 1881.)

Garber, Thornton & Bishop, for Defendant.

The District Court had not jurisdiction of the action of *Cunningham v. Crowley*, and its judgment and all other proceedings therein were void.

1. At the time of the filing of Cunningham's application, there was no law in force authorizing any application for, or authorizing the purchase or sale of the land in controversy. The application was filed on the thirty-first day of December, 1872, and was made under the provisions of Section 53 of the Act of 1868, as amended. The amendment to that section, in force on December 31, 1872, was the amendment made by

Section 4 of the amendatory Act of April, 1870. The first portion of this section provides, in a perfectly intelligible and intelligent manner, for the subjects to which it relates. It is only the last clause, or that referring to the purchase of land other than the sixteenth and thirty-sixth sections, which is imperfect. But that clause, which was the only provision then in existence referring to or purporting to deal with the purchase or sale of these lands, is so utterly unintelligible that no action of any kind could be inaugurated under it, and no right acquired or founded upon its provisions. It failed to express any rational intent; it was incapable of interpretation, and incapable of execution. (*Copp v. Harrington*, 47 Cal. 240.)

But notwithstanding that the latter clause of the section was nonsense, nevertheless the section, as found in the amendatory Act, operated as a repeal of and a substitute for the corresponding section of the Act of 1868. Only a portion, not the whole, of the amendatory or substituted section was nonsense; but, whether nonsense or not, it was, by the express declaration of the Legislature, substituted for the original section. Both by the express language of the amendatory act and by operation of law, the original section, as a whole, was abrogated, and the new one, as a whole, substituted. The original section was effectually repealed and obliterated from the statute book. (*Goodno v. City of Oshkosh*, 31 Wis. 127.)

There being no law authorizing application for or the purchase or sale of such lands, the filing of Cunningham's application was a nullity and wholly ineffectual to give him any rights in the premises or to create any contest.

No contest having arisen in the office of the Register or Surveyor General, the District Court had no jurisdiction of the action of Cunningham against Crowley, and this want of jurisdiction appears upon the face of the complaint therein.

It is the existence of the contest and not the making of an order of reference that gives jurisdiction. If there be really no contest in the sense of the law, the making of an order of reference by the Surveyor General or Register does not give jurisdiction to the Court. The power to make such order is limited by the terms of the Act to "cases where a contest shall arise concerning the approval of a survey or location

before the Surveyor General, or concerning a certificate of purchase, or other evidence of title before the Register." (*Keema v. Doherty*, 51 Cal. 3; *Allen v. Dake*, 50 id. 80; *Vance v. Edwards*, 52 id. 93; *Berry v. Cammet*, 44 id. 351; *Thompson v. Ingham*, 14 Q. B. 710; *Chew v. Holroyd*, 8 Exch. 24; *Perkins v. Proctor*, 2 Wils. 382; *Terry v. Huntington*, Hard. 480; *Mulligan v. Smith*, 59 Cal. 206.) "The presumption in favor of the jurisdiction of Superior Courts necessarily ceases when the proceedings themselves negative the existence of jurisdiction." (1 Smith's L. C. 1029; *Freeman on Judgments*, § 125; *Gray v. Larrimore*, 2 Abb. (U. S.) 548; *Roger v. Shannon*, 52 Cal. 99.)

Assuming, however, that the District Court did have jurisdiction of the action of *Cunningham v. Crowley*, its judgment therein only established that, as against Crowley, Cunningham had the better right to purchase. It does not preclude the State, or any subsequent applicant prior to the issuance of the patent, from questioning in the Land Department the right of Cunningham to obtain the title.

The rule should not be readily adopted according to which a judgment in an action between two persons binds and concludes those who are not parties to it, and who have no opportunity and no right to be heard in the action in which it is rendered. If such a rule should be adopted in respect to these actions to determine contests, it would only be necessary, in order to estop and bind the State, and prevent every other person from making application to purchase, for an applicant to procure some confederate to make a second application, create a contest; have it referred to the Courts; admit the validity of the other party's application and proceeding, except as to some matters in respect to which an untenable objection would be raised only to be overruled, and without the real objection or the merits having been presented, a judgment would be rendered which would be binding upon the whole world.

The State has no right to be heard in these actions; a subsequent applicant has no right to intervene; the contestants are the only proper parties to the suit (*Cunningham v. Crowley*, 51 Cal. 132), and the contest must be referred to the Court where these two parties only can be heard, but

where the rights and claims of the State, and of all other persons, are to be foreclosed, upon the demand of either. Is it not apparent that there is here afforded the widest opportunity for the perpetration of frauds through collusion between the apparent contestants? To this action none but these contestants are parties; over it they have exclusive control; the issues to be determined in it, and the questions to be presented, are not framed or even suggested by the officer of the State, but are left entirely to the parties, and there is given to the Court simply jurisdiction to determine which of the two adverse claimants has the preference. The language of the statute is, that "either party may bring an action in the District Court * * * to determine such conflict, and the proffer of a certified copy of the entry * * * shall give said District Court full and complete jurisdiction to hear and determine said conflict." Not to determine or ascertain any independent right as against the owner of the land, or to determine absolutely, or as an independent proposition, that one party has the right, but simply to determine the issue created by and existing between the two contestants, namely, which, as against the other, is entitled to purchase; or, in other words, which one is entitled to a preference over the other. (*Cunningham v. Crowley, supra.*)

The only effect attributable to the judgment in a contest is that given by the express words of the statute, viz.: That the Surveyor General, or Register, "shall give his approval of the survey or location, or issue the certificate of purchase or other evidence of title, in accordance with said final judgment."

In the case at bar, this was done; but the approval of the survey or location, and the issuance of the certificate of purchase in accordance with the judgment, can have no greater force, efficiency, or conclusiveness, than such approval and issuance by the officers of the Land Department, where no contest has arisen and no judgment has been rendered. In that case, as we have seen, no question exists as to the right of the land officers to receive applications from other parties, and upon protest and demand to refer the case to the Courts for determination as a contest.

It is said that the question presented in this case was deter-

mined in *Laugenour v. Shanklin*. This is incorrect. There was no question there as to the jurisdiction of the District Court in the contest. But aside from that, the application in *Laugenour v. Shanklin* was for a mandate to compel the Surveyor General to approve the petitioner's application to purchase in accordance with and in obedience to the judgment rendered in his favor in the contest. The Court awarded the writ, because the language of the statute was peremptory, and prescribed in unmistakable terms the duty of the Surveyor General in such cases, which was to approve the application.

But in this case, that duty has been performed, and the question is a very different one, viz., the effect of that approval upon the rights of a subsequent applicant, who claims to be entitled to purchase and upon whose demand the contest with Cunningham, which he alleges is created by his application, is referred by the Surveyor General to the Superior Court.

MORRISON, C. J. :

This case is brought before us on an agreed statement of facts, from which it appears that contests having arisen in the office of the Surveyor General, between the plaintiff and other parties, respecting their rights to purchase certain lands belonging to the State, the same were referred to the District Court of the Twentieth Judicial District for determination, under Sections 3414, 3415, and 3416 of the Political Code. In pursuance of the order of reference, the plaintiff commenced actions in said District Court for the purpose of having such conflicting claims determined, and such proceedings were had in them, that, on the first day of August, 1874, the Court entered its judgment in one of the cases, whereby it was "ordered, adjudged, and decreed, that the said James F. Cunningham is entitled to purchase said land, and to have his application, described in his complaint for the purchase of said land, approved. * * * That his location thereof be approved," and directing the Surveyor General of said State, "upon the filing in his office of a copy of said decree, duly certified, to approve the said application and location of said Cunningham, and to issue to him a certificate

thereof," etc. On the fifteenth day of February, 1875, judgments were entered in the other cases to the same effect. On the fourteenth day of August, 1878, one J. S. Manley filed an application for the same land, and on the twenty-sixth day of August, 1881, he made a demand that the contest between Cunningham and himself be referred to the proper Court for trial. On the thirty-first day of August, 1881, the Surveyor General and *ex officio* Register of the State Land Office made an order referring said contest to the Superior Court of Santa Cruz county for trial. These are the substantial and material facts presented by the agreed statement, and the following are the questions which are submitted to us for decision:

1. Whether the case of *Cunningham v. Crowley*, above mentioned, is a proceeding *in rem* or in the nature of a proceeding *in rem*, giving the said Cunningham a right to purchase said land absolutely?

2. Are the State and the officers thereof estopped from selling the same land to an applicant who filed his claim pending the said action or subsequent thereto?

3. Was the Surveyor General authorized by law to receive the application of said Manley *et al.*, and did the reception and filing of said application create such a contest in the office of the Surveyor General or Register of the State Land Office, as would authorize said officers to refer the parties to Court to litigate their respective claims, before Cunningham would be entitled to his patent under Section 1519 of the Political Code?

4. Is the judgment in *Cunningham v. Crowley* an estoppel against proceedings to sell to Manley?

5. Finally, is Cunningham entitled to his writ of mandate against said Shanklin to compel him to take the necessary steps to issue to him a patent, notwithstanding the Surveyor General has certified that a contest exists between Cunningham and Manley, and has referred the same to Court?

By Section 3416 of the Political Code it is provided that "upon filing with the Surveyor General or Register, as the case may be, a copy of the judgment of the Court, that officer must approve the survey or location, or issue the certificate of purchase or other evidence of title in accordance with such judgment."

Was the action a proceeding *in rem*? *In rem* is a technical term used to designate proceedings or actions instituted *against the thing*, in contradistinction to personal actions which are said to be *in personam*. Proceedings *in rem* include not only those instituted to obtain decrees or judgments against property, as forfeited in the Admiralty or the English Exchequer, or as prize, but also suits against property to enforce a lien or privilege in the Admiralty Courts, and suits to obtain the sentence, judgment, or decree of other Courts upon the personal *status* or relations of the party, such as marriage, divorce, bastardy, settlement, or the like." (1 Bouvier's Law Dict. 693.) Decisions in such cases are "binding and conclusive, not only upon the parties actually litigating in the cases, but upon all others. * * * Every one who can possibly be affected by the decision has a right to appear and assert his own rights, by becoming an actual party to the proceedings," etc. (1 Greenl. Ev., § 525.) We are not prepared to say that the proceeding under the statute in question is a proceeding *in rem*, although it may bear some resemblance to such a proceeding.

But are the officers of the State estopped thereby from selling the same land to an applicant who filed his claim pending the action brought to determine the contest, or subsequent thereto? This question must be answered in the affirmative, as it was by the Court sitting in bank in the case of *Laugenour v. Shanklin*, 57 Cal. 70. Mr. Justice Ross, delivering the opinion of the Court, says: "There would be no end to cases of this character if, after judgment had been entered in an action to determine the right of contestants to purchase, new parties can come in to prevent the enforcement of such judgment. Section 387 of the Code of Civil Procedure does not authorize an intervention under such circumstances. It having been determined by the Court in the action of *Wright v. Laugenour*, 55 Cal. 280, that the application of the petitioner for the purchase of the land in dispute was good and valid, and that the application of Wright therefor was invalid, it becomes the duty of the respondent, by virtue of Section 3416 of the Political Code, to approve petitioner's application."

The facts of that case are similar to those presented in the

case now under consideration, and the principles announced therein are decisive of the present case.

The Surveyor General was not, therefore, authorized to receive the application of Manley, and thereupon to direct a second reference for a second trial. It was his duty to obey the directions of the Court, contained in the judgment upon the first contest, and therefore the plaintiff is entitled to a writ of mandamus.

Let the writ issue as prayed for.

SHARPSTEIN and THORNTON, JJ., concurred.

[No. 6,614.—In Bank.]
March 1, 1882.

OAKLAND BANK OF SAVINGS *v.* P. S. WILCOX.

OVERDRAFTS—LIABILITY OF OFFICERS OF A BANK—INSTRUCTIONS—USAGE.—

Action by a bank against its President for the amount of overdrafts of one C., alleged to have been drawn for the benefit of the business of a hotel in which the defendant and C. were jointly interested, and to have been paid by direction of the defendant. The verdict and judgment were for the plaintiff. The evidence tended to show that the money was drawn for use in the joint business as alleged; that C. was induced by the defendant to open an account with the bank, and that at various times, from April 1st to July 9th, overdrafts of C. were paid by direction of defendant; that at the latter date (the account then showing a balance in favor of C.) defendant, by reason of ill-health, left the city, and was absent from the bank till July 30th, but before absenting himself did not give instructions to the Cashier not to pay overdrafts; that during his absence the overdrafts in question were made and paid by the Cashier; that according to the by-laws of the plaintiff it was the duty of the Finance Committee to pass upon and to allow or refuse all loans. The Court instructed the jury in effect, that if the overdrafts of C. during the months of April, May, and June, were authorized by the defendant it was the duty of defendant, upon absenting himself, to instruct the Cashier to discontinue paying the overdrafts of C.; that the question was: were the overdrafts made in the month of July, which were lost to the bank, paid by the Cashier in the course of a dealing established and inaugurated by the defendant, or were they paid by the Cashier contrary to or against the express directions of the defendant; also, that a usage at the bank (of which there was some evidence before the jury) to allow customers to overdraw, would not justify an officer of the bank in case of loss; that such usage was nothing more than a usage or practice to misapply the funds of the bank.

Held, The law as applicable to this case was, in substance, correctly given by the Court below. There were, substantially, but two questions for the jury to consider, viz.: 1. Did Wilcox inaugurate the account and its method of being carried on, and direct officers of the bank to pay overdrafts, and were the amounts of overdrafts after July 9th paid in pursuance of and as a part of the method inaugurated by Wilcox? 2. Was he interested in the business of the hotel, and in maintaining it? These questions answered in the affirmative fix the liability upon him, and to sustain such answers the evidence is ample.

ID.—ID.—ID.—IMMATERIAL ERROR.—An instruction indicating that all overdrafts, under all circumstances, constitute fraud, and also an instruction that “if he (the president) should fail in skill,” he would be responsible, *held* to be incorrect, but in view of the actual issues involved, not calculated to injure the defendant.

ID.—ID.—BY-LAWS.—Where the by-laws of a bank forbid loans to be made without the approbation of the finance committee, it is a violation of duty for the President or Cashier to loan upon his or their own judgment.

ID.—ID.—BREACH OF TRUST—FIDUCIARY.—An officer of a bank can not make profit to himself out of the loans made by him of the money of the bank, and if losses occur in the attempt he must bear the losses.

ID.—ID.—INSTRUCTIONS.—There was no error in refusing the instructions asked for by defendant and refused.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial in the Third District Court, County of Alameda. **McKEE, J.**

The instructions asked by the defendant and refused by the Court are as follows:

1. “This action is brought to recover the sum of four thousand five hundred seventy-three and thirty-five one hundredths dollars, on the ground that defendant, Wilcox, connived with one Charles W. Carter, and requested said Carter to draw checks on the plaintiff when he had no money on deposit with it, which checks the defendant, as President of the plaintiff, and with the intent to defraud it, ordered paid.”

2. “Fraud is an intent, ‘not criminal,’ unlawfully, designedly, and knowingly, to appropriate the property of another. Before you could find a verdict for the plaintiff, therefore, you must find that the agreement between Carter and the defendant, in regard to the obtaining of money from the plaintiff (if there was any), was made with the intent, ‘not criminal,’ upon the part of the defendant to unlawfully, designedly, and knowingly appropriate the property of plaintiff for the im-

provement of the Grand Central Hotel, of which the defendant was a part owner."

3. "The officers of a corporation are not personally liable for loss to the funds through a mere error, unless there has been negligence or fraud."

McAllister & Bergin, for Appellant.

From the statement already made the Court will observe that all overdrafts previous to July, 1875, and those for recovery of which this action was brought, were made subsequently to the sickness and during the absence of Wilcox from the bank.

The gravamen of this complaint, therefore, rests upon the averment that "at various times, said Carter, with the connivance, consent, and at the request of said Wilcox, drew checks upon plaintiff for money when he had no money on deposit with plaintiff, which checks were with the knowledge, consent, and connivance of defendant, and by his orders duly paid by the Cashier of plaintiff." This is denied, and we submit that there is no proof to sustain it. The instructions of the Court were erroneous and calculated to mislead the jury. The first and second portions of the instructions excepted to were clearly calculated to mislead, in view of the issues before the jury.

Note.—These instructions are as follows:

"They (the bank officers) are bound in law to exercise reasonable skill and ordinary care and diligence." Also, "If he (President of the corporation) should transcend or abuse his powers; if he should fail in skill, or omit ordinary care and diligence, or be guilty of any wrongful or fraudulent act in discharging his duties, in consequence of which a loss results to the bank, he is responsible in law for it." The instructions generally were erroneous.

As to measure of liability of Directors to corporation, see *Spring's Appeal*, 71 Pa. St. 20; *Scott v. Depeyster*, 1 Edw. Ch. 541; *Percy v. Millaudon*, 20 Mart. (La. 68); *Hodges v. N. E. Screw Co.*, 1 R. I. 312; Whart. Neg., § 510; *Leffman v. Flannigan*, 5 Phila. 150; *Maisch v. Savings Fund*, id. 30; *Railroad Co. v. Bridges*, 7 B. Mon. 558; *Godboldt v. Branch Bank*.

11 Ala. 191; *Shea v. Knoxville and Ky. R. R. Co.*, 6 Bax. 277; *Dunn v. Kyle*, 14 Bush (Ky.), 134.

In *Commercial Bank of Albany v. Ten Eyck*, 48 N. Y. 310, the Court say: "I do not, however, assent to the claim of the counsel for the appellant, that a cashier, in all cases, becomes personally liable when he permits an overdraft. It is not an uncommon thing for bankers to permit overdrafts, with an understanding that the account should be made good before the close of banking hours on that day or soon after; and whether such overdrafts are prudent or not, depends upon the character and standing of the drawer, and upon the circumstances of each case."

The instructions of the Court, in the case at bar, are manifestly opposed to this plain principle of justice. Under the instructions of the Court an overdraft makes the officer liable regardless of good faith, sound judgment, or the highest exercise of prudence; it makes him insurer, not for good faith, etc., but for the absolute payment of the money. This is not in accord with common experience, and is a measure of liability not exacted of any officer of a bank. The true rule is stated by the Court of Appeals in the extract cited.

The first and second instructions asked for defendant are correct, and should have been granted.

The third instruction is correct, and should have been given.

E. W. McGraw, for Respondent.

This Court will, of course, consider the instructions as a whole, and it will be more convenient to discuss them as a whole, and in the discussion of them, before considering the language used by the Court, we will state our view of the legal principles which underlie the case.

That the utmost good faith is exacted from Directors and other officers of corporations in their dealings with such corporations or the property thereof, is a rule too well known to require the fortification of authority.

But the application of that rule in various cases, under circumstances having more or less resemblance to those we have recited, will fully justify the charge of the Court in the case at bar.

The general duty which the defendant owed to plaintiff is clearly and succinctly stated in *Morse on Banking* (2d ed.), 114, 115. (*German Savings Bank v. Wulfekuhler*, 19 Kan. 60.)

As to the illegality and fraudulent nature of overdrafts without security, there is no difference of opinion among jurists, whatever may be the opinion of bankers.

The drawing of a check without funds to meet it, is a fraudulent act. (*True v. Thomas*, 16 Me. 36; *Peterson v. Union National Bank*, 52 Pa. St. 208; *Minor v Mechanics' Bank*, 1 Pet. 72; *Eichelberger v. Finley*, 7 Har. & J. 387; *Bank of St. Mary's v. Calder*, 3 Strobb. 408; *Lancaster Bank v. Woodward*, 18 Pa. St. 362.)

That an officer of a bank is liable for money lost to the bank through his gross negligence, misconduct, or connivance, is beyond dispute. (*Robertson v. Smith*, 3 Paige, 231; *Shear v. K. & K. R. R. Co.*, 6 Baxter (Tenn.), 278; *Cooley on Torts*, 522; *Shea v. Mabry*, 1 Lea (Tenn.), 319.)

The instructions excepted to gave to the jury the law of the case in exact accordance with the decisions we have noticed. Those portions of that instruction italicized as above, are assigned as errors. We submit they are good sense as well as good law. It is not denied that Carter's credit at the bank was established by defendant. That up to the eighth of July, all overdrafts had been made with his sanction, or by his express wishes. That he had facilities possessed by no other officers of the bank for ascertaining the exact financial *status* of Carter. Any man of common business prudence doing business on his own account, who had been in the habit of giving credit to a doubtful customer, would, on the eve of absence from business, instruct his clerks or salesmen as to the continuance or limitation of that credit. A failure to do so, in case he wished the credit to be discontinued, would be gross negligence. (*Brown's Legal Maxims*, 329; *Richardson v. Kier*, 34 Cal. 75.)

As we have seen, the law condemns negligence in the performance of the duties of a President of a bank. If any reasonable man in the conduct of his own business, would, under similar circumstances, have given the notice suggested by the Court, then the law exacted that notice of defendant, and the charge of the Court below was correct.

The notice was necessary not only to absolve the defendant from the charge of negligence, but to clear him from the taint of fraud which attaches to the transaction, by reason of the personal interest of the defendant in these very overdrafts, the payment of which he is seeking to avoid.

MYRICK, J.:

This is an action to recover four thousand five hundred and seventy-three dollars and thirty-five cents and interest, for the overdrafts of one Carter drawn upon the plaintiff. The complaint alleges that defendant was President of plaintiff, and as such its executive officer and general agent; that he and Carter were interested in carrying on a hotel, defendant being interested in the profits; that Carter was without means; that he had no money deposited with plaintiff, but, having occasion to use money in the business of the hotel, was induced by defendant to draw checks upon plaintiff and to open an account with plaintiff; that defendant, in violation of his duty to plaintiff, directed and caused the Cashier of plaintiff to pay the checks of Carter, and that by reason thereof the account of Carter was overdrawn to the amount sued for.

The case was tried by a jury, and a verdict was rendered for plaintiff for the full amount above named. Defendant's motion for a new trial being denied, he appealed.

Evidence was given tending to show that the defendant and one Reese were the owners of a hotel, and that an arrangement was made between defendant and Carter in accordance with which Carter obtained from Reese a lease of the undivided half of the hotel, and defendant gave to Carter a lease of the other half, and Carter was to and did carry on the business of keeping the hotel, he paying Reese six hundred dollars for rent of one half, defendant to share in the profits of the business for his rental; that Carter had no money to pay the rent to Reese, and defendant induced him to draw a check upon the plaintiff for the first month's rent, which check defendant directed the Cashier of plaintiff to pay; that in carrying on the business it was necessary for Carter to have money, and in order to obtain it, defendant induced Carter to open an account with plaintiff and take a pass-book,

and directed the officers of plaintiff to open an account and issue the pass-book; that from time to time deposits were made and checks were drawn, resulting as follows: From April 1, 1875, to April 11th, the account was overdrawn; April 12th, a small balance in favor of Carter; April 13th, a small amount overdrawn; from April 14th to May 17th, balances in favor, on several days being over four thousand dollars; May 18th to May 24th, overdrafts, ranging from one hundred and thirty-four to over six hundred dollars; from May 25th to June 13th, balances in favor, ranging from three hundred and four dollars to over three thousand dollars; June 14th to June 30th, overdrafts ranging from over three hundred dollars to over two thousand dollars; from July 1st to July 9th, balances in favor, ranging from two hundred and eighty-three dollars to one thousand five hundred and thirty-four dollars; from July 10th to July 29th, overdrafts, beginning with one thousand one hundred and twenty-one dollars and ninety-six cents and reaching four thousand four hundred and forty-five dollars and twenty-three cents, when the account was stopped and payment of checks was refused; that when Wilcox was at the bank at the times checks overdrawn the account came in, it was the custom of the Cashier to show them to defendant, stating the fact of being overdrafts, and asking him if they should be paid, to which he replied by directing the payments; that on or about July 9th (the account then showing a balance in favor of Carter), defendant, by reason of ill-health, left the city and was absent some ten days, then returned for a few days, and went away again and remained until about August 1st, but was not at the bank during the few days between the two journeys; that at no time prior to July 30th, did defendant give instructions to the Cashier of the bank not to pay any overcheck; that before absenting himself defendant did not give any directions to the Cashier to pursue any course other than that inaugurated by him, viz., receive deposits and pay checks as they come in.

The other Directors of the bank were not advised that the overdrafts reached any considerable amount. After defendant returned from his trips, one of the Directors, having spoken to defendant of the magnitude of the overdrafts, was

told by defendant that Carter would probably assign bills against boarders; the Director suggested that the debts be garnisheed, but defendant objected, that such course would break up the hotel and injure the men in it. According to the by-laws of plaintiff, the President is, subject to the by-laws and the Directors, the general agent of the corporation; the Cashier is to take charge of the moneys and property of the corporation; and loans are to be made only on the time and conditions prescribed in the by-laws. It is the duty of the Finance Committee to pass upon and allow or refuse all applications for loans. There is no provision in the by-laws for permitting accounts to be overdrawn. It is the duty of the Auditing Committee to supervise the mode in which the business is conducted, to count the cash and examine, or cause to be examined, the books, vouchers, documents, papers, and other assets of the corporation.

It will thus be seen, if there be any fault arising from the facts in this case, such as would entitle the plaintiff to recovery, the duty of protecting the funds of the depositors of the bank, was devolved upon various persons, viz.: It was the duty of the Finance Committee to allow or refuse all applications for loans; of the Auditing Committee to count the cash and examine vouchers and assets; of the Cashier not to permit any loan to be made unless by the order of the Finance Committee; and of the President to govern his own transactions, and see that the transactions of the other officers were governed by the by-laws of the corporation, in the interest of the stockholders and depositors, and in their interest only. The Cashier would not be protected in his omission of duty, by the direction of the President; nor would the non-performance of duty by the Cashier shield the defendant from the legitimate consequences of acts which he took upon himself.

The Court below instructed the jury as follows, the portions excepted to by defendant being by us put in italics, to prevent repetition:

"As business men, you understand that a bank is, or should be, operated for the benefit of its stockholders and those doing business with it. Its operation requires for officers, men who should be possessed of diligence, fitness, and capacity,

as well as honesty, for bank duties; and in the discharge of these duties, *they are bound in law to exercise reasonable skill and ordinary care and diligence.* They are but agents of the corporation, and if they transcend or abuse their powers, they are responsible for any losses resulting from it. Especially is this rule of law applicable to the President of the corporation; for being then the financial officer of the bank, other officers are subordinate to him, and act generally under directions from him. *If he should transcend or abuse his powers—if he should fail in skill, or omit ordinary care and diligence, or be guilty of any wrongful or fraudulent act in discharging his duties, in consequence of which a loss results to the bank, he is responsible in law for it.* Such is the law applicable to the officers of the bank in the discharge of their duties.

“Whether the defendant, as President of the bank, has violated his duty or committed any illegal act, intentionally or unintentionally, in connection with the overdrafts charged against him in this case, is a matter for your consideration upon the evidence.

“You are the exclusive judges of the credibility of witnesses examined, and of the facts proved by their testimony. I may say to you, however, that there is little, if any, conflict of evidence as to the question of the course of dealings between Carter and the bank. Carter was, by the defendant, permitted to overdraw from the bank.

“The defendant himself testifies that it was the custom of the Cashier of the bank to submit to him, as President, overdraft checks as they came in. The first check drawn by him was presented to the Cashier of the bank on the first or second of April, 1875, for the first month's rent of the hotel due to Michael Reese; when presented at the counter of the bank, the Cashier asked the defendant if he should pay it, and says the defendant: ‘I said to him, yes, pay it.’ Two or three days, or a week afterwards, he adds: ‘The Cashier asked me if he should give Carter a pass-book,’ and I said, ‘Yes, give him one.’ At this time, therefore, *the defendant, according to his own testimony, directed the Cashier to pay the overdraft, and induced Carter to open an account with the bank, and directed the Cashier to give him a pass-book.* That being the

position of the parties at that time, *Carter afterwards, during the months of April, May, and June, made overdrafts and occasional deposits from time to time. Now, if you find that this course of dealing between Carter and the bank was inaugurated and established by the defendant, it is a violation of the duty which he owed to the bank, for which he would be responsible in law, if the amount of such overdraft were lost to the bank. That would be the case, gentlemen, whether he were individually interested in the money obtained or not. In either case it would be a misapplication of the funds of the bank; but these overdrafts were not lost to the bank. The evidence shows that Carter had made deposits from time to time, while he was making overdrafts, up to a time when the account between him and the bank was, as the witnesses say, square. This was early in July. The exact date you will ascertain from the statement of the accounts in evidence; as to the overdraft before that time, it has been correctly said to you by counsel for defendant, that the defendant is not liable, but the question of his responsibility arises from the overdrafts made by Carter after that time. You will recollect, gentlemen, that the defendant testifies that he was taken sick early in July; that he left Oakland for the Springs, I think, about the seventh or eighth of July. The exact date you will determine from the evidence, and that he stayed away until the seventeenth.*

"He returned to Oakland, he said, on the evening of the seventeenth. In his absence it appears that the overdrafts of Carter had run up to several thousand dollars, and when he returned, the Cashier and Bookkeeper, and some of the Directors of the bank, Blair, I believe, had interviews with him on the subject of these overdrafts. Now, you will recollect that when the defendant absented himself in July, he left Carter to run the hotel, as he had been doing before. When he left the bank at that time, he had a duty to perform to the bank. If he authorized an overdraft by Carter for the benefit of the hotel, which had been continued by his authority, sanction, and approval, through the months of April, May, and June, it was his duty when he left for the Springs, to absent himself for some time, to give instructions or orders to the Cashier of the bank as to whether that course of dealing was

to be continued or discontinued during his absence. The law did not allow him to remain silent under such circumstances, for all former overdrafts were illegal, and when he was about to absent himself, he should have given such instructions or orders as would indicate that the practice of Carter in making those overdrafts should be stopped, limited, or continued, and although the Cashier of the bank, in paying such overdrafts by Carter, is not himself excusable in law, yet that fact does not relieve the President, if by his act or conduct loss resulted to the bank from these overdrafts. If, therefore, you should find from the evidence, gentlemen, or from his conduct in leaving, or from his declaration or declarations after his return, that he knowingly permitted Carter to overdraw and the Cashier to pay these overdrafts, as a means of getting money from the bank to run the business of the hotel in which he and Carter were interested, or otherwise, during his absence, as they had done during the months of April, May, and June, he would in law be liable for any loss resulting from the overdraft; but, if you find that the Cashier paid them, contrary to and against the express direction of the defendant as President of the bank, you should find for the defendant.

"You observe, therefore, gentlemen, that the issue that is presented to you for your consideration and verdict, is not whether the defendant is responsible for overdrafts, before July, for those, although illegal, were afterwards paid by the drawer, and the bank having suffered no loss in consequence, no liability for that attaches to the defendant.

"The evidence concerning that, is principally important in showing whether an illegal course of dealing between Carter and the bank had been established by the connivance or directions of the defendant, and whether that course of directions continued through the month of July, with his connivance, knowledge, and consent, until the loss in controversy resulted to the bank. *The question is, were the overdrafts, during the month of July, which were lost to the Bank, paid by the Cashier, in the course of the dealing established and inaugurated by the defendant, or were they paid by the Cashier, contrary to, or against the expressed directions of the defendant.*

"At the request of the defendant, and to aid you in the solution of that question, I give you the following instructions:

"Fraud is never to be presumed, and when it is alleged for the purpose of depriving a party of a right, the fact of its existence must be clearly made out. The mere fact that Wilcox was a joint owner in the Grand Central Hotel, and that the money drawn was, if you should so find, used in the improvement of the Grand Central Hotel, is not sufficient in itself for the plaintiff to recover.

"Before you can find a verdict for the plaintiff, you must further find that the checks constituting the overdraft for which this suit was brought, were drawn by Carter with the knowledge and consent of the defendant, and also that they were paid by the Cashier of the plaintiff by the order of the defendant, as President of said corporation.

"Connivance is an agreement or consent, directly or indirectly given, that something unlawful shall be done by another. Before you can find a verdict for the defendant, you must find that Wilcox, directly or indirectly, agreed that Carter should unlawfully draw checks which he, Wilcox, as President of the corporation, would order paid.

"And on the same question I give you the following instruction asked for by the plaintiff:

"If the jury believe from the evidence that the defendant caused C. W. Carter to open an account with the plaintiff by an overdraft, that such overdraft was to the knowledge and with the consent of defendant, followed by other overdrafts, that the overdrafts were of advantage to the business in which the defendant was interested—these are facts tending to prove a connivance and consent of the defendant to the overdrafts made during his temporary absence, and the absolute knowledge of which, at the time they were made, was not brought home to him by the testimony.

"A President of a bank who, knowing a customer to be without means, induces him to open an account at the bank and to overdraw that account by his orders to the Cashier—establishes a custom of paying such overdrafts—fails in his duty to the bank. If he himself profits by that overdraft he commits a fraud upon the bank. It does not excuse him from the charge of connivance and the knowledge and pro-

curation of such overdraft, that the particular checks drawn and paid, in accordance with the custom established and sanctioned by him, were drawn and paid without his actual knowledge. In considering the question of the liability of the defendant, his conduct subsequently, as well as previous, to the overdraft may be considered by the jury. It was the duty of the defendant, as President of plaintiff, to inaugurate and prosecute any suit or action necessary to protect the interest of the bank; and if the jury shall find from the evidence, that after the overdraft sued on had occurred, the defendant used his position and influence, as President of plaintiff, to prevent the plaintiff of availing itself of legal remedies to secure the indebtedness incurred by overdrafts, and if the jury further find, from the evidence, that legal remedies, that were available to the plaintiff, would have been an injury to the defendant, and were opposed by the defendant for that reason, the jury have a right to consider such opposition of the defendant in the light of and as illustrating the previous action of the defendant, in relation to Carter's account at the bank, as the same is detailed by the evidence.

"It is evidence tending to show a connivance with Carter in making the overdrafts. An overdraft on a bank, if made without authority, is a fraud on the part of the drawer; if suggested, countenanced, connived at, and allowed by the President of the bank, without authority of the Directors, it is a fraud on the part of the President. To establish the complicity of the President it is not necessary to prove direct expressed directions from him as to the drawing or payment of each check overdrawn. The jury have a right to take into consideration all the declarations and acts of the President in relation to the subject-matter, and also his business connection with the drawer of the checks; and if you shall believe, from the evidence in this case, that the President, for his own benefit, inaugurated and established a custom of overdrawing by Carter, and did not at any time break up such system, they are authorized to believe that overdrafts made in his temporary absence, and which inured, in whole or in part, to his benefit, were made with his assent, approval, and connivance.

"It has been said to you, gentlemen, during the argument

of the case, that it was a usage at the bank to allow customers to overdraw, and have checks and notes charged up without present funds in the bank. I believe there is evidence before you showing the existence of such a usage to a certain extent. The fact, however it may be, is for you to find. But I say to you, as a matter of law, that if such a usage did exist, it would not justify an officer of the bank in case of loss. The usage is still nothing more than usage and practice to misapply the funds of the bank, and to connive at the withdrawing of the same without any security. Such a usage and practice is a manifest departure from the duty both of the Directors and President of the bank as can not receive any countenance in a Court of Justice. It can not be done by the sanction or approval of any officer of the bank, and when done it is at his own peril and responsibility, especially if done in his own interest."

Defendant asked the Court to instruct the jury as follows: "Fraud is an intent, 'not criminal,' unlawfully, designedly, and knowingly to appropriate the property of another. Before you could find a verdict for the plaintiff, therefore, you must find that the agreement between Carter and the defendant in regard to the obtaining of money from the plaintiff (if there was any) was made with the intent, 'not criminal,' upon the part of the defendant to unlawfully, designedly, and knowingly appropriate the property of plaintiff for the improvement of the Grand Central Hotel, of which the defendant was a part owner." The Court refused to give such instruction, to which refusal the defendant then and there excepted.

The Court gave the following instruction: "*A president of a bank, who, knowing a customer to be without means, induces him to open an account at the bank, and to overdraw that account, and by his orders to the Cashier establishes the custom of paying such overdraft, fails in his duty to the bank.*"

The Court also gave the following instruction: "*An overdraft of a bank, if made without authority, is a fraud on the part of the drawer; if suggested, countenanced, connived at, and allowed by the President of the bank without any authority of the Directors, it is a fraud on the part of the President.*"

As to some of the instructions, indicating that all overdrafts under all circumstances, constitute fraud, the language of the instructions given may be too broad; but, from the facts of this case, we do not think that any injury was done to the defendant, nor that such error was committed as calls for a reversal of the judgment.

We think the law as applicable to this case was, in substance, correctly given by the Court below. We are not prepared to agree with the Judge in instructing the jury that "if he (the President) should fail in skill" he would be responsible; but that expression has no application to this case. There is no question of skill about it. There seems to be no question as to the fact of the overdrafts, nor as to the fact that the money was for the benefit of the hotel. There were, therefore, substantially, but two questions for the jury to consider, viz:

1. Did Wilcox inaugurate the account and its method of being carried on and direct the officers of the bank to pay overdrafts, and were the amounts of overdrafts after July 9th paid in pursuance of and as a part of the method inaugurated by Wilcox?

2. Was he interested in the business of the hotel, and in maintaining it?

These questions answered in the affirmative fix the liability upon him; and to sustain such answers the evidence is ample.

In this case neither the President nor the Cashier had any authority to permit an account to be overdrawn. To make an overdraft was a fraud in law on the part of the drawer; to pay or authorize the payment was a fraud in law on the part of the officer paying or authorizing payment. The money of the stockholders was invested, and of the depositors was deposited, to the end that the business should be managed as the by-laws should prescribe; those by-laws forbid loans to be made without the approbation of the Finance Committee; and when the President or Cashier went beyond that, and loaned upon his or their own judgment, a violation of duty occurred. This is independent of any interest that Wilcox may have had in the hotel business. That interest added to the reason why he should not have caused or permitted the overdrafts. In *F. & M. Bank v. Downey*, 53 Cal. 466, the Court

held that an officer of a bank could not make profit to himself out of loans made by him of the money of the bank; and it very naturally follows, if losses occur in the attempt he must bear the losses. "The Directors are the trustees or managing partners, and the stockholders are the *cestuis que trust*, and have a joint interest in all the property and effects of the corporation, and no injury that the stockholders may sustain by a fraudulent breach of trust can, upon the general principles of a court of equity, be suffered to pass without a remedy." (*Koehler v. Black R. F. I. Co.*, 2 Black, U. S., 715, 721.) As is said in *Morse on Banking*, p. 317, speaking of the custom of permitting overdrafts and kindred practices, "The language of the adjudicated cases is not capable of being explained away."

"In the case of a saving fund incorporated for the purpose of receiving the money of persons of humble fortune, and keeping it safely against the day of old age, want, or illness, there is, in the nature of things and of common right, a trust coupled with the obligation, a duty not only merely to pay on demand, but to keep safely, and invest wisely, in order that there may be the means of payment. * * * Every departure from the proper course in this respect on the part of the directors or managers of a saving fund is a breach of trust, of which equity will take cognizance, and hold them individually and personally liable." (*Leffman v. Flanigan*, 5 Phil. 155.) "Where the President of a bank makes loans of the bank funds to irresponsible persons without security, having a private interest of his own to advance thereby, the bank may charge him personally with the loans and recover the amount in a suit at law." (*Cooley on Torts*, p. 522; *Shea v. Mabry*, 1 Lea, (Tenn.) 319.)

"When agents and others acting in a fiduciary capacity, understand that these rules will be rigidly enforced, even without proof of actual fraud, the honest will keep clear of all dealings falling within their prohibition, and those dishonestly inclined will conclude that it is useless to exercise their wits in contrivances to evade it." (*Bain v. Brown*, 56 N. Y. 288.)

We refer to the following cases as sustaining the views above expressed. (*Minor v. Mech. Bank*, 1 Pet. 72; *Eichel-*

berger v. Finley, 7 Har. & J. 387; *Bank of St. Mary's v. Calder*, 3 Strobb. 408; *Lancaster Bank v. Woodward*, 18. Pa. St. 362; *Robinson v. Smith*, 3 Paige, 231; *Shear v. K. & K. R. R. Co.*, 6 Bax. (Tenn.), 278.)

There is no error in refusing the instructions asked for and refused.

Judgment and order affirmed.

MORRISON, C. J., and McKEE and THORNTON, JJ., concurred.

[No. 10,674.—In Bank.]

March 2, 1882.

THE PEOPLE v. FRANK P. MORROW.

LARCENY.—CIRCUMSTANTIAL EVIDENCE.—INSTRUCTION.—On the trial the Court gave the jury the following instruction: "There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of an eye-witness to the commission of the crime, and the other is proof by testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence. Such evidence may consist of admissions by the defendant, plans laid for the commission of the crime, such as putting himself in position to commit it; in short, any acts, declarations, or circumstances admitted in evidence tending to connect the defendant with the commission of the crime. There is nothing in the nature of circumstantial evidence that renders it any less reliable than other classes of evidence. A man may as well swear falsely to an absolute knowledge of the facts as to a number of facts from which, if true, the facts on which the guilt or innocence depends, must inevitably follow.

"No human testimony is superior to possible doubt, and all that is required, if under the foregoing rules the testimony is sufficient to convince you as reasonable men to a moral certainty and beyond a reasonable doubt, that the defendant committed the act charged in the information, then I charge you it is your duty to convict."

And it was claimed that the forgoing instruction was erroneous, because, in the very nature of things, there is an inherent difference between direct and positive evidence, and circumstantial evidence.

Held: The instruction contained a correct statement of the law and was free from legal exception.

ID.—CREDIBILITY OF WITNESS TESTIFYING IN HIS OWN BEHALF.—WEIGHT OF EVIDENCE.—INSTRUCTION.—The Court instructed the jury as follows: "The defendant has offered himself as a witness, on his own behalf, on

this trial, and in considering the weight and effect to be given his evidence, in addition to noticing his manner and probability of his statements, taken in connection with the evidence in the cause, you should consider his relations and situation under which he gives his testimony, the consequences to him relating from the results of this trial and the inducements and stipulations which would ordinarily influence a person in his situation. You should carefully determine the amount of credibility to which his evidence is entitled, if convincing and carrying with it a belief in its truth, to act upon it; if not, you have a right to reject it."

Held: The defendant, in a criminal case, testifying in his own behalf, occupies a relation to the case different from that occupied by any other witness. It is only by virtue of a provision of the Code that he is permitted to testify at all, and it is manifest that he labors under the strongest temptation to which any witness could be subjected. It is not error, therefore, for the Court to call the attention of the jury to that circumstance, and we see no error in the instruction complained of. (SHARPSTEIN AND MCKEE, JJ. dissenting.)

APPEAL from a judgment of conviction in the Superior Court of Napa County.

Clara S. Foltz, for Appellant.

A. L. Hart, Attorney General, for Respondent.

MORRISON, C. J.:

The appellant was convicted in the Court below of the crime of grand larceny, and on the argument of the appeal to this Court, two points were relied on, as ground for the reversal of the judgment of the Superior Court.

1. On the trial the Court gave the jury the following instruction:

"There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of an eye-witness to the commission of the crime, and the other is proof by testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence. Such evidence may consist of admissions by the defendant, plans laid for the commission of the crime, such as putting himself in position to commit it; in short, any acts, declarations, or circumstances, admitted in evidence tending to connect the defendant with the commission of the

crime. There is nothing in the nature of circumstantial evidence that renders it any less reliable than other classes of evidence. A man may as well swear falsely to an absolute knowledge of the facts as to a number of facts from which, if true, the facts on which the guilt or innocence depends, must inevitably follow.

"No human testimony is superior to possible doubt, and all that is required, if under the foregoing rules the testimony is sufficient to convince you as reasonable men to a moral certainty and beyond a reasonable doubt, that the defendant committed the act charged in the information, then I charge you it is your duty to convict."

It is claimed that the foregoing instruction was erroneous, because, in the very nature of things, there is an inherent difference between direct and positive evidence, and circumstantial evidence.

Speaking upon this subject, an eminent writer upon the law of evidence says: "Circumstantial evidence is of two kinds, namely, *certain* or that from which the conclusion in question necessarily follows, and *uncertain*, or that from which the conclusion does not necessarily follow, but it is *probable* only, and is obtained by process of reasoning. Thus, if the body of a person of mature age is found dead, with a recent mortal wound, and the mark of a bloody *left* hand is upon the *left* arm it may well be concluded that the person once lived, and that another person was present at or since the time the wound was inflicted. *So far the conclusion is certain*, and the jury would be bound by their oaths to find accordingly. * * * In civil cases, it is sufficient if the evidence, on the whole, agrees with and supports the hypothesis which it is adduced to prove: but in criminal cases it must exclude every other hypothesis but that of the guilt of the party. In both cases a verdict may well be founded on circumstances alone; *and these often lead to a conclusion more satisfactory than direct evidence can produce.*"

In the case of the *Commonwealth v. Webster*, 5 Cush. 295, Chief Justice Shaw uses the following language:

"The distinction between direct and circumstantial evidence is this: Direct or positive evidence is when a witness can be called to testify to the precise fact which is the subject

of the issue on trial; that is, in a case of homicide, that the party accused did cause the death of the deceased. Whatever may be the kind or force of the evidence, this is the fact to be proved. But suppose no person was present on the occasion of the death, and of course that no one can be called to testify to it, is it wholly unsusceptible of legal proof? Experience has shown that circumstantial evidence may be offered in such a case; that is, that a body of facts may be proved of so conclusive a character as to warrant a firm belief of the fact, quite as strong and certain as that on which discreet men are accustomed to act in relation to their most important concerns. It would be injurious to the best interests of society if such proof could not avail in judicial proceedings. If it was necessary always to have positive evidence, how many criminal acts committed in the community, destructive of its peace and subversive of its order and security, would go wholly undetected and unpunished?

"The necessity, therefore, of resorting to circumstantial evidence, if it is a safe and reliable proceeding, is obvious and absolute. Crimes are secret. Most men, conscious of criminal purposes, and about the execution of criminal acts, seek the security of secrecy and darkness. It is, therefore, necessary to use all other modes of evidence besides that of direct testimony, provided such proofs may be relied on as leading to safe and satisfactory conclusions; and, thanks to a beneficent Providence, the laws of nature and the relations of things to each other are so linked and combined together, that a medium of proof is often thereby furnished, *leading to inferences and conclusions as strong as those arising from direct testimony.*

"On this subject, I will once more ask attention to a remark in the work already cited—'East's Pleas of the Crown' (Ch. 5, Sec. 11): 'Perhaps,' he says, 'strong circumstantial evidence, in cases of crimes like this, committed for the most part in secret, is the most satisfactory of any from whence to draw the conclusion of guilt; for men may be seduced to perjury by many base motives, to which the secret nature of the offense may sometimes afford a temptation; but it can scarcely happen that many circumstances, especially if they be such

over which the accuser could have no control, forming together the links of a transaction, should all unfortunately concur to fix the presumption of guilt on an individual, and yet such a conclusion be erroneous.”

The case of the *People v. Videto*, 1 Parker's Criminal Reports, 603, is to the same effect, and it is there said that “circumstantial evidence is admissible both in civil and criminal cases, and in prosecutions, for some of the worst species of crimes, is often the most satisfactory and convincing that can be produced.”

The remarks of Mr. Justice Park, in his charge to the jury in the case of *The King v. John Thurtell*, 2 Wheel. Crim. Cas. 461, are cited with approval in the case of *People v. Cronin*, 34 Cal., 203, and are very forcible. He said: “The eye of Omniscience can alone see the truth in all cases: circumstantial evidence is there out of the question: but clothed as we are with the infirmities of human nature, how are we to get at the truth without a concatenation of circumstances? Though in human judicature, imperfect as it must necessarily be, it sometimes happens, perhaps in the course of one hundred years, that in a few solitary instances, owing to the minute and curious circumstances which sometimes envelop human transactions, error has been committed from a reliance on circumstantial evidence; yet this species of evidence, in the opinion of all those who are most conversant with the administration of justice and most skilled in judicial proceedings, is much more satisfactory than the testimony of a single individual who swears he has seen a fact committed.”

Chief Justice Gibson charging a jury in a capital case, said, that “circumstantial evidence is, in the *abstract*, nearly, though perhaps not altogether, as strong as positive evidence; in the concrete it may be infinitely stronger.” (*Com. v. Harman*, 4 Barr., 269.) And Chief Justice Whitman of Maine, in the case of *State v. Thomas*, 6 Law. Rep., 64, said that “circumstantial evidence is often stronger and more satisfactory than direct, because it is not liable to delusion or fraud.”

It is unnecessary to add any more authorities in support of the instruction complained of. In our opinion it contained a correct statement of the law, and was free from legal exception.

2. The second point is made upon the following instruction, which, it is claimed, on behalf of defendant, was erroneous:

"The defendant has offered himself as witness, on his own behalf, on this trial, and in considering the weight and effect to be given his evidence, in addition to noticing his manner and probability of his statements, taken in connection with the evidence in the cause, you should consider his relations and situation under which he gives his testimony, the *consequences* to him relating from the results of this trial and the *inducements* and stipulations which would ordinarily influence a person in his situation. You should carefully determine the amount of credibility to which his evidence is entitled; if convincing and carrying with it a belief in its truth, to act upon it; if not, you have a right to reject it."

The foregoing instruction was copied from an instruction given in the case of *People v. Cronin*, (*supra*), and the Supreme Court, in the Cronin case, held it to be correct. In that case the same objection was made to the instruction that is made here. There it was contended that the Judge made an assault upon the defendant's evidence, singling it out and making it figure as a pointed and prominent part of the charge. (See also, *People v. Nichols*, 34 Cal. 211.)

The defendant, in a criminal case, testifying in his own behalf, occupies a relation to the case different from that occupied by any other witness. It is only by virtue of a provision of the Code that he is permitted to testify at all, and it is manifest that he labors under the strongest temptation to which any witness could be subjected. It is not error, therefore, for the Court to call the attention of the jury to that circumstance, and we see no error in the instruction complained of. The case of *The People v. Cronin*, *supra*, was determined nearly fifteen years ago, and in respect to the point now being considered, its authority has not been shaken by any subsequent decision. We see no reason to disturb it now.

The judgment is affirmed.

ROSS, MYRICK, and THORNTON, JJ., concurred.

SHARPSTEIN J., dissenting:

I dissent. The Code provides that on all proper occasions the jury shall be instructed: "That their power of judging

of the effect of evidence is not arbitrary, but to be exercised with legal discretion and in subordination to the rules of evidence." (C. C. P. 2,061.)

I know of no rule of evidence by which a jury would be authorized to reject the evidence of a witness because it was not convincing, and did not carry with it a belief in its truth. If convinced that it was untrue the right to reject it would be clear. But there is a substantial difference between evidence that fails to convince and to carry with it a belief in its truth and that which carries with it a belief in its falsity. If satisfied that it was false the jury might properly reject it. Otherwise it should have been considered in connection with the other evidence. If the evidence of the defendant was favorable to himself, and convincing, and carried with it a belief in its truth, no other evidence would have been required to establish his innocence. I do not think that any witness is required to inspire in the minds of the jury such implicit confidence in the accuracy of his evidence as this instruction requires in order to have it considered in connection with the other evidence in the case. The jury had no more right to reject the evidence of the defendant on that ground than it would have to reject the evidence of any other witness on that ground. The law does not require that a defendant's evidence shall be more convincing than that of any other witness to entitle it to consideration.

The other instruction, though less objectionable than the one which I have noticed, was, I think, more likely to mislead than to aid the jury in any attempt it might make to distinguish between the two classes of evidence referred to.

I therefore think that the judgment should be reversed.

McKEE, J.:

I dissent. Although the last instruction, as set forth in the prevailing opinion, has been approved in the case of *The People v. Cronin*, it is, in my judgment, not law.

In the case in hand, the defendant had testified in his own behalf; and the jury were told, substantially, not to act upon his testimony, unless it was convincing and carried with it a belief in its truth. Such an instruction as to the testimony of any other witness would not be upheld, and yet a defend-

ant as a witness in his own behalf is entitled to the same right as any other witness to have his testimony weighed and considered by the jury in connection with the facts and circumstances of the case. To tell a jury that they are not to act at all upon the testimony of a witness, unless it produces conviction in their minds, is to take away from them all discretion of judging whether part of the testimony may be true, and part of it untrue, or how far any of it may be corroborated by any other testimony, or by the facts and circumstances of the case.

Of course, if the defendant's testimony or, indeed, the testimony of any other witness, satisfies the minds of the jurors of its truth, that would be conclusive of the facts established by it. Being convincing, the jurors are bound by it. But it may be less than convincing, and yet not absolutely false. It may be true in part and untrue in part. Some of it may be corroborated by the testimony of other credible witnesses, or by some of the facts and circumstances developed by their testimony. If so, a jury would have no right to disregard the testimony. A jury is not bound to take the whole of the testimony of any witness. His statement may not be convincing: that is rarely attainable in judicial proceedings. But it is the duty of the jury to weigh the testimony, and if any part of it is corroborated by other credible witnesses it is entitled to due consideration in connection with the probabilities of the case. Otherwise the privilege of being sworn as a witness in his own behalf is, to a defendant, a mockery.

[No. 7,794.—Department Two.]

March 7, 1882.

J. W. GAFFORD v. E. R. BUSH, JUDGE OF THE SUPERIOR COURT OF YOLO COUNTY.

JURISDICTION — SUPERIOR COURT — SUNDAY LAW — MISDEMEANOR—The Superior Court has no jurisdiction of an indictment for the violation of § 300 Penal Code.

ID.—ID.—ID.—ID.—JUSTICE'S COURT.—By virtue of power vested in the Legislature by § 11, Art. vi. Const., that department of the Government by § 115 C. C. P. as amended April 1, 1880, gave to Justice's Court

jurisdiction of "all misdemeanors punishable by fine not exceeding five hundred dollars or imprisonment not exceeding six months or by both such fine and imprisonment."

APPLICATION for writ of prohibition.

J. C. Ball and J. Craig, for Plaintiff.

By a comparison of the Constitution, Art. vi. § 5 and C. C. P. §§ 76 and 115, as amended in 1880, it will be seen that the Superior Court has no original jurisdiction of this class of misdemeanors. Section 917 provides that an indictment is an accusation in writing presented by a grand jury to a competent Court charging a person with a public offense.

The presentment of an indictment to a Court having no jurisdiction to hear and determine the matter cannot be in compliance with the provision of this section.

W. B. Treadwell, for Defendant.

It is conceded in petitioner's brief that this case would be within the rule laid down in *Ex parte McCarthy* (53 Cal. 412) were it not for certain alleged changes in the Constitution and statute of the State since that decision.

By examination of the various provisions bearing upon the subject it will be seen that it is nowhere said that the jurisdiction of the Justices' Courts shall be exclusive as to these offenses nor that they may not be prosecuted by indictment. (Const. Art. i., § 8; Art. vi., § 5; Art. vi., § 11; C. C. P. §§ 76, 85, 115, 117, 192, 241, 242, 253; Pen. C. §§ 682, 888, 915, 944, 976, 1,033.)

By Sec. 915, Pen. C., it is expressly made the duty of the grand jury to inquire into all public offenses committed or triable within the county. When the indictment is found it must be presented to the Superior Court; and by § 976 the defendant must be arraigned before the Court in which it is filed. There is, therefore, a specific direction of the Code that these as well as all other offenses when prosecuted by indictment must be tried in the Superior Court. It being plain that the grand jury may lawfully find an indictment for this offense; that such indictment if found must be found in and returned to the Superior Court; that no provision is made for the transfer of the indictment to the Justice's Court.

nor any power given to that Court to try any indictment, and that the indictment is expressly made triable only in the Superior Court, no doubt can remain that this case is not provided for otherwise than by trial in the Superior Court within the meaning of Art. v., § 6 Const. § 76 C. C. P. Inasmuch as the provisions of § 915 Pen. C. are, as to this matter, identical with those of § 85 C. C. P. the decision in *Ex parte McCarthy* is applied to and conclusive of this case.

THORNTON, J.:

The petition shows that on the fourth day of May, the Grand Jury for the county of Yolo returned to the Superior Court of that county an indictment by which the petitioner Gafford was accused of the crime of misdemeanor, in willfully and unlawfully keeping open on Sunday, the twentieth day of March, 1881, a saloon in the town of Davisville, in the county above named, for the purpose of selling liquors and cigars therein; that said Superior Court thereupon caused a warrant to be issued, upon which the petitioner was arrested and brought before said Superior Court on the sixteenth day of May, 1881, arraigned and required to plead to this indictment; that he then interposed a motion to set aside the indictment, on the grounds (and another not necessary to be any further referred to herein) that it (the indictment) was presented to a Court that had no authority to receive it, or to hear, try, or determine the facts set out in the indictment; that the defendant was then and at and before the time that the indictment was presented to said Superior Court held to answer to the identical offense charged in the indictment, in the Justice's Court of Putah township, county of Yolo, and State aforesaid, before William King, Justice, where the matter was then pending.

This motion was overruled by the Court, and the petitioner was held to answer in the Superior Court. It was further set forth in the petition that the said Court will proceed to try the cause set out in the indictment, and to pronounce judgment thereon. To prohibit this, the writ of prohibition is asked for.

The above petition was demurred to on the ground that

the facts stated therein did not entitle the petitioner to the relief asked for, or to any relief.

The jurisdiction of the Superior Courts in criminal cases is defined by the Constitution of 1879, as extending to "all criminal cases amounting to felony, and cases of misdemeanor, not otherwise provided for." (See § 5 of Art. vi.)

Has it been otherwise provided for? The expression "not otherwise provided for" is not confined in its scope to the Constitution. If this was the intention, the language would have indicated it more clearly by using the words "not otherwise provided for *herein*." As to jurisdiction in case of misdemeanors, a discretion was no doubt intended to be left to the Legislature and authority was left in the legislative department to vest the jurisdiction in a certain class or classes of such minor offenses in courts other than the Superior Courts. No doubt this was a wise and judicious policy, for by it the Superior Courts would be left to attend to cases of a more important character, and they would not consume time in trying persons charged with petty offenses, to the neglect of matters of a graver nature.

By virtue of power vested in the Legislature by Section 11 of Article vi of the Constitution to determine the number of the Justices of the Peace to be elected in the several political divisions of the State and to fix by law their powers, duties, and responsibilities, that department of the Government, by the act of April 1, 1880, amended Part One of the Code of Civil Procedure, by substituting a new Part One for the former one of that Code; and by Section 115 of such new Part One gave to Justices' Courts jurisdiction of "all misdemeanors punishable by fine not exceeding five hundred dollars or imprisonment not exceeding six months, or by both such fine and imprisonment." (See Amendments to Code of Civ. Pro. for 1880, p. 36.)

The offense for which the petitioner was proceeded against is punishable by a fine not less than five nor more than fifty dollars (Pen. Code, Sec. 300), and comes within the Act of April 1, 1880, which provides for the jurisdiction of such offenses, and vests it in the Courts of Justices of the Peace.

The other questions discussed by counsel in this cause are considered and decided by Department One of this Court in

Ex parte Wallingford, No. 10,722. (See opinion filed February 28, 1882.) With the conclusion reached therein by the learned Justices of that Department we fully concur. They need not be further considered.

We are of opinion that the Superior Court had no jurisdiction to entertain the indictment above mentioned or to try the petition under it, and therefore, the demurrer must be overruled. So ordered.

SHARPSTEIN, J., and MORRISON, C. J., concurred.

[No. 7,755.—In Bank.]

March 7, 1882.

PEOPLE v. E. MARTIN.

LICENSE TAXES—CONSTITUTIONAL LAW—TAX—DEFINITION.—The license fees imposed by the Political Code were imposed mainly, if not solely, for purposes of revenue and are therefore in effect *taxes* within the meaning of that term as used in §12 Art. xi. of the Constitution. (McKEE, J. dissenting.)

ID.—ID.—REPEAL OF STATUTE.—Such license taxes being imposed for county purposes are in contravention of the section above referred to and the sections of the Political Code imposing the same are therefore no longer in force. (McKEE, J., dissenting.)

APPEAL from a judgment for the plaintiff and from an order denying a new trial in the Superior Court of the County of Santa Cruz. LOGAN, J.

Julius Lee and *Z. N. Goldsby*, for Appellant.

Section 3360 of the Political Code is repugnant to the provision of Article ix, Section 12, of the Constitution of this State, and is therefore void. Taxes are defined to be burdens or charges imposed by the legislative power of a State upon persons or property to raise money for public purposes, by whatever name they may be called, as tribute, tithe, talliage, impost, duty, gabel, custom, subsidy, aid, supply, excise, or other name. (2 Bouvier Law. Dic. Title Tax; Blackwell on Tax Titles p. 1, 6 John R. 92: 11 John R. 77; *Bleeker v. Ballon*, 3 Wend. 263.)

This Court has repeatedly and uniformly declared this charge paid for a license to be a "tax" notably in *City of Santa Barbara v. Stearns*, 51 Cal. 499. (Cooley on Const. Lim. 201; *Ex parte Hurd*, 49 Cal. 557; *Emery v. Bradford*, 26 Id. 75; *Emery v. S. F. Gas. Co.*, 28 Id. 345; *People v. Raymond*, 34 Id. 492; *Attorney General v. Squiers*, 14 Id. 18.)

W. D. Storey, for Respondent.

The law under which this action is brought is not repugnant to Section 12 of Article xi. of the Constitution.

1. The word "taxes" in that section is to be understood in the sense usually given to it when found in such connections as it is found in here, and not construed so as to include every possible species of assessment that may be regarded as in some sense a kind of taxation.

But adjudications, as well as reason, fortify the position that the word "taxes," in Section 12 of Article xi. of the Constitution, is not to be construed in the manner contended for by the appellant. (*People v. Naglee*, 1 Cal. 232; *People v. Coleman*, 4 Id. 46; *People v. McCreery*, 34 Id. 448; *State v. Poulterer*, 16 Id. 524; *Attorney-General v. Squiers*, 14 Id. 19; *Anderson v. Doll*, 27 Id. 607-611; *Emery v. San Francisco Gas Co.*, 28 Id. 345; *Johnson v. Macon*, Rep. Feb. 18, 1880, p. 208.)

Ross, J.:

This action was commenced under and by virtue of Section 3,360 of the Political Code to recover the amount of a license tax claimed to be due from the defendant by reason of his carrying on the business of selling goods, wares, and merchandise at a fixed place of business in the county of Santa Cruz. The section of the Code mentioned is one of a number of sections relating to licenses, enacted prior to the adoption of the present Constitution, by which the Legislature imposed upon those who should engage in certain kinds of business and occupations in the statute enumerated a certain license tax for the privilege of so engaging. Such exactions are by the statute required to be collected (by suit if necessary, in the name of The People of the State) by the Tax Collector of the county in which the party on whom it is imposed desires to

engage in the business or occupation, and when collected, to be paid by the Tax Collector into the County Treasury for the use of the County General Fund.

By Section 12 of Article xi. of the present Constitution it is declared: "The Legislature shall have no power to impose taxes upon counties, cities, towns, or other public or municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may, by general laws, vest in the corporate authorities thereof the power to assess and collect taxes for such purposes."

The important question in the case is, whether or not the word "taxes" as used in this section of the Constitution include license taxes; for, if it does, the provisions of the Political Code imposing and providing for the collection of the license tax here in question, are clearly inconsistent with this section of the Constitution, and therefore inoperative by virtue of Section 1 of Article xxii. of the same instrument.

That the license fees imposed by the provisions of the Political Code were so imposed mainly, if not solely, for the purposes of revenue, does not admit of doubt; and where that is the case, they are, in effect, taxes. (Cooley on Taxation, pages 396-7; 2 Dillon on Mun. Corp., Sec 768.) Indeed, the statute itself designates the charge as a license tax. (Political Code, Sec. 3,359.)

But are they "taxes" within the meaning of Section 12 of Article xi. of the Constitution? We are of the opinion that they are. It is clear that that section is not limited to taxes upon *property*; for by its express language the Legislature is prohibited from imposing taxes upon the *inhabitants* of counties, cities, towns, or other public or municipal corporations, as well as upon their *property*, for county, city, town, or other municipal purposes. The defendant is an inhabitant of the county of Santa Cruz, engaged in the business of selling goods, wares, and merchandise. The tax imposed upon him, and which it is proposed to collect, was undoubtedly imposed for county purposes; for, as already observed, the statute authorizing it, required the tax when collected to be paid into the County Treasury for the use of the County General Fund. The power to impose such taxes for such purposes, in our opinion, no longer remains with the Legislature; but the

Constitution expressly gives it the power, by general laws, to vest in the corporate authorities of the counties, cities, towns, or other public or municipal corporations, the power to assess and collect taxes for those purposes.

The taking of the power to impose such taxes from the Legislature and vesting it in the local authorities, is but another of the many evidences to be found in the new Constitution of the intention to bring matters of a local concern home to the people.

Judgment and order reversed.

MORRISON, C. J., and MCKINSTRY, THORNTON, MYRICK, and SHARPSTEIN, JJ., concurred.

McKEE, J., dissenting:

I dissent. I think the legislation which is called in question is not obnoxious to the constitutional provisions referred to in the prevailing opinion. The law was passed in exercise of the police power, for the purpose of regulating certain kinds of business and occupations in any town, city or particular locality, in any county of the State. It requires of any one who wishes to engage in such business or occupations to procure a license from the Tax Collector of the county; and it declares that if any one carries on, or attempts to carry on such business without first procuring a license therefor, he shall be amenable to an action for the recovery of the license tax with costs, etc. (Secs. 3,359, 3,360 Political Code.) The license authorized by the law is obtainable upon payment of a fee fixed for that purpose. The fee is called a "license tax," which, when paid, is turned into the County Treasury. As a fee it is not a tax imposed upon the person, or the property, or the business of the payor. No assessment is made upon the property, or the business, or the person of him who carries on, or attempts to carry on a business without procuring a license. The fee is simply an exaction, for the purpose of securing a right; and he who seeks to avail himself of the right must comply with the corresponding duty attached to it by payment of the fee to the authorities of the county, city or town. The fact that the fee is paid into the County Treasury does not make it a revenue tax. It is revenue only so far as to pay the expenses of the county, city or town, for issuing the licenses and supervising the business.

[No. 7,111.—In Bank.]

March 9, 1882.

MATILDA A. EDWARDS v. DAVID BURRIS.

SLANDER OF TITLE—COMPLAINT—PLEADING—REDEMPTION OF LAND.—In an action for slander of title the complaint in effect alleged "that during the entire year of 1878, up to October 26, plaintiff was the owner in fee as her separate property" of a tract of land in Sonoma County; that on October 26, 1878, the Sonoma Valley Bank caused the said land to be sold, under a decree of foreclosure of mortgage thereon; that at the sale the defendant became the purchaser of the land for seven thousand six hundred and sixty dollars; "and the plaintiff had the period of six months, from October 26, 1878, in which to redeem from the sale;" that for the purpose of redemption, she entered into negotiations with one Otto Schetter and others for the sale of said land; and Schetter had agreed to purchase the same from her, and pay her therefor ten thousand dollars, but he was dissuaded and prevented from completing the purchase by the defendant, on December 10, 1878, maliciously and without probable cause, speaking in the presence and hearing of the said Otto Schetter and others, the following words concerning the said property and the plaintiff, (here follow the words complained of); that these words were "false and made with the intent to prevent any sale of the property by the plaintiff, or any sale of her right to redeem," *per quod* the plaintiff was damaged nine thousand dollars for which she asked judgment with costs.

Held: The complaint shows affirmatively that the plaintiff was owner in fee of the land only until October 26, 1878, when the defendant acquired title to it as purchaser at the foreclosure sale; and that the alleged slander of title was published December 10, 1878, at which time it follows that the plaintiff was *not* the owner. The averment that she was entitled to redeem the mortgaged premises within six months after the sale to the defendant, is a mere conclusion of law unsustained by any affirmative averment of fact. To entitle the plaintiff to the *status* of a redemptioner, it should have been alleged that she was the mortgagor, or judgment debtor, or the successor in interest of the judgment debtor, or a creditor having a *lien* by judgment or mortgage on the property sold, etc.

Id.—Id.—Id.—Such an action is only maintainable by one who possesses an estate or interest in real or personal property, against one who maliciously comes forward and falsely denies or impugns his title thereto, if thereby damage follows to the plaintiff.

APPEAL from a judgment for the defendant in the Superior Court of the County of Sonoma.

Geo. A. Johnson and B. Henley, for Appellant.

There are two causes of action alleged in the complaint.

All the elements of a good complaint are contained in each cause of action, viz.: the malice, falsity, and special damage as the natural and proximate consequence of the alleged publication. (Townsend on Libel and Slander, Sec. 204.)

Rutledge & McConnell, for Respondent.

The *colloquium* charges the actionable words to have been spoken of and concerning the property and the plaintiff. But the words alleged to have been spoken concerns the title to the property, and does not slander the property or the plaintiff.

The office of a *colloquium* is attempted to be supplied by an *innuendo*. This can not be done. (Townsend on Slander and Libel, §§ 335 and 336 and § 130 and note. *Clark v. Fitch*, 41 Cal. 472; *Peterson v. Seutman*, 37 Md. 140, and 11 Am. Rep. 534; *Snell v. Snow*, 13 Metc. 278; *Miller v. Maxwell*, 16 Wend. 9; *Tyler v. Tillotson*, 2 Hill. 507; *Dodge v. Lacy*, 2 Cart. 213; *Milligan v. Thorn*, 6 Wend. 413; *Van Vechten v. Hopkins*, 5 Johns. 211; *Goldstein v. Foss*, 4 Bing. 489; 1 Stark. on Slander, 384 and 385. See form of complaint in 2 Chit. Pl. 641 J and K.)

The distinction between slander of title and slander of property is illustrated by the case of *Paull v. Halferty*, 63 Penn. 46; reported in 3 American Reports, 518.

The plaintiff alleges that during the year 1878 up to October 26th, she was the owner in fee of the property, but there is no averment of any title in her after that time.

If she succeeded to the mortgagor's equity of redemption that fact is not alleged, and we have shown that the want of such an averment cannot be supplied by an *innuendo*.

To possess the right of redemption the plaintiff must be the judgment debtor, or his successor in interest. or a creditor having a lien. (§ 701, C. C. P.)

McKEE, J.:

This was an action in the nature of an action for slander of title. A demurrer to the complaint was sustained by the Court below, and as the plaintiff declined to amend, judgment of dismissal was entered, from which comes this appeal.

Substantially, the complaint alleges "that during the entire

year of 1878, up to October 26th, plaintiff was the owner in fee as her separate property" of a tract of land in Sonoma county; that on October 26, 1878, the Sonoma Valley Bank caused the said land to be sold, under a decree of foreclosure of mortgage thereon; that at the sale the defendant became the purchaser of the land for seven thousand six hundred and sixty dollars; and the plaintiff had the period of six months, from October 26, 1878, in which to redeem from the sale;" that for the purpose of redemption, she entered into negotiations with one Otto Schetter and others for the sale of said land; and Schetter had agreed to purchase the same from her, and pay her therefor ten thousand dollars; but he was dissuaded and prevented from completing the purchase by the defendant, on December 10, 1878, maliciously and without probable cause, speaking, in the presence and hearing of the said Otto Schetter and others, the following words "*concerning the said property and the plaintiff*."

"'She can not sell the place,' meaning the plaintiff could not sell her equity of redemption in said property, and had no right to redeem the same; 'she never owned the place; the conveyance of it to her by her mother was fraudulent,' meaning that the conveyance to plaintiff by plaintiff's grantor, Mrs. F. Haraszthy, of said property, was fraudulent; and, if you buy the place I will get out letters of administration upon the estate of Mrs. Haraszthy and take the place away from you, and you will get into litigation and lose the property and your money,' meaning that the said grantor of plaintiff, Mrs. Haraszthy, was now dead, and the said conveyance was fraudulent and void, and that if the said Schetter should buy the said property from the plaintiff, or the equity of redemption thereof, that it was the intention of said defendant to get out said letters of administration, and involve said Schetter in expensive litigation, great trouble and annoyance, and a loss of the property and of money."

Other words of like import are also set forth in a second count of the complaint containing a similar *colloquium and like innuendoes*; and all these words were, as the complaint alleges, "false and made with the intent to prevent any sale of the property by the plaintiff, or any sale of her right to

redeem," *per quod* the plaintiff was damaged nine thousand dollars, for which she asked judgment with costs.

It will be observed that the complaint shows affirmatively that the plaintiff was the owner in fee of the land only until October 26, 1878, when the defendant acquired title to it as purchaser at the foreclosure sale; and that the alleged slander of title was published December 10, 1878, at which time it follows that the plaintiff was *not* the owner. It also shows, negatively, that she was not the mortgagor, nor a party to the foreclosure proceedings of the decree under which, she admits, the defendant acquired title to the land at the foreclosure sale. Being neither the mortgagor, nor a party to the action in foreclosure, the plaintiff was not bound by the proceedings. She was, therefore, not a redemptioner within the meaning of Section 701, C. C. P.: and the averment that she was entitled to redeem the mortgage premises within six months after the sale to the defendant is a mere conclusion of law unsustained by any affirmative averment of fact.

To entitle the plaintiff to the *status* of a redemptioner it should have been alleged that she was the mortgagor, or judgment debtor, or the successor in interest of the judgment debtor, or a creditor having a *lien* by judgment or mortgage on the property sold, etc. (Sec. 701, C. C. P.) In the absence of such averments from the complaint, and in the presence of an allegation that at the time of the publication of the alleged slander, the plaintiff was not the owner of the property concerning which the slanderous words were spoken, she had no estate or interest in the property which entitled her to maintain an action for the slander. Such an action is only maintainable by one who possesses an estate or interest in real or personal property, against one who maliciously comes forward and falsely denies or impugns his *title* thereto, if thereby damage follows to the plaintiff. (Odgers on Slander, 138; *Hargrave v. Le Breton*, 4 Burr, 2,422; *Smith v. Spooner*, 3 Taunt. 246.)

The *gravamen* of the action is the slander of plaintiff's title. "It is," says Townshend on Slander, § 206, "publishing language not of the person, but of his right or title to something. * * Things are merely external to the person, and include whatever one may or may be entitled to own

possess or enjoy. * * But one may speak or write whatever he may please concerning a thing, and with any intention towards the thing, and for such speaking or writing no action can be maintained. The thing can not complain; it has no rights to be invaded. But although things have no rights, persons may have a right in or to a thing—the right of property—and this right may be invaded by language concerning the thing. When this invasion occurs the language which affects a thing is actionable.” (Id. § 204; *Hargrave v. Le Breton*, 4 Burr, 2,422; *Smith v. Spooner*, 3 Taunt., 246.)

Unless, therefore, a plaintiff shows title or interest in the property, falsehood and malice in the utterance of slander concerning it, and an injury to the plaintiff, there is no cause of action; and as the complaint in this case did not affirmatively show that the plaintiff had title or interest in the property at the time of the alleged *tort*, it was, as a pleading, defective, and the demurrer was properly sustained.

Judgment affirmed.

MORRISON, C. J., and MYRICK and THORNTON, JJ., concurred.

[No. 7040.—In Bank.]

March 9, 1882.

B. F. STEVENS v. CORNELIUS QUIRK ET AL.

PRIOR POSSESSION—EJECTMENT—FINDING.—Ejectment upon an alleged prior possession. Findings upon this issue and judgment for defendant. *Held*: The finding was justified by the evidence.

ID.—ID.—IMMATERIAL FINDING—PREEMPTIONER.—*Held further*: The finding that the defendant entered as preëmptioner was not sustained by the evidence; but the fact found is immaterial.

APPEAL from a judgment for the defendant and from an order denying a new trial in the Twentieth District Court of the County of Monterey. BELDEN, J.

The following are the findings of the Court:

1. This controversy is concerning the north one half of the southwest quarter of section 23, township seventeen
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south, range 6 east, Mount Diablo meridian, and located in the County of Monterey.

The whole of this section was, and still is, a part of the public domain and subject to preëmption.

2. In the year 1873 the plaintiff entered upon the northeast quarter of section 23, township seventeen south, range 6 east, Mount Diablo meridian, and erected thereupon a dwelling house and outbuildings, and has since with his family resided upon the same.

3. During that year (1873), and the following year the plaintiff plowed and cultivated portions of the southwest quarter of section 23, but had no fencing upon the same. Nor was there any house upon the same until August, 1878, when the plaintiff erected a small shanty about twelve feet square upon said southwest quarter. This shanty was not occupied by any person, and was placed there for the sole purpose of "holding" said quarter and preventing other parties locating upon the same.

4. During all the time that plaintiff has resided upon this section, one "Williams" has been an intimate friend of his family, and has frequently visited at the house of plaintiff, remaining as plaintiff's guest for many days at a time.

Williams is a mechanic and has all this time resided at 'Menlo Park,' his visits to plaintiff being occasional and only as a matter of friendship.

5. At the time plaintiff erected the small house upon this southwest quarter, he caused a written notice to be placed upon the same in which this southwest quarter was claimed to be located and held for this man "Williams." This cabin was about half a mile from the house occupied by plaintiff as a dwelling. About the time that this cabin was built plaintiff also procured a well to be dug near this cabin. This well was about eight feet deep, and plaintiff paid for digging the same.

6. No other work or improvement was made by plaintiff upon this southwest quarter than the construction of this cabin, digging this well and cultivating portions of the land. No fencing or inclosure of any kind has been placed by plaintiff upon this southwest quarter.

7. Upon the northeast quarter of section 23, occupied by

plaintiff's dwelling, there are one hundred and sixty acres claimed by plaintiff as a preëmption and all occupied and controlled by plaintiff as such.

8. The small cabin was occasionally used by plaintiff to store grain or hay in, but generally there was nothing in it. It was never occupied by any person as a residence or dwelling. In 1876 and 1877 the plaintiff cultivated about one hundred acres of the southwest quarter, most of it for hay, but a small piece in potatoes.

9. Upon the 10th of September, 1878, the defendant, "Cornelius Quirk," entered upon this southwest quarter, claiming to so do as a preëmptioner. He erected a small cabin near the small cabin built by plaintiff, and ever since has and still occupies the same.

Both plaintiff and defendant are qualified preëmptioners of the United States, and the defendant was in the occupation of the southwest quarter when this action was commenced, and is still occupying the same, claiming to do so as a preëmptioner.

The plaintiff has not had such exclusive possession and control of the north one half of the southwest quarter of section 23 as will enable him to maintain ejectment against a qualified preëmptioner, who enters for the purpose of preëmpting the same.

Judgment for the defendant for his costs of suit.

S. M. Swinnerton, for Appellant.

It does not matter for the purposes of this action what the intentions or object of plaintiff were, if the fact is established beyond dispute that plaintiff was cultivating and using the land at the time of defendants' entry on the same. Public land of the United States is not subject to entry by any one while it is in the possession of another. On the authority of *Atherton v. Fowler*, 96 U. S. 513; *Hosmer v. Wallace*, 7 Otto, 579, and *Hosmer v. Duggan*, 56 Cal. 257. The plaintiff in this action relies on cultivation as evidence of his possession, and there is no *conflict* of evidence on the point in the record.

Wm. H. Webb, for Respondent.

The COURT:

For the reasons given by Department Two in its opinion in this case, filed November 8, 1881, the judgment and order are affirmed.

The following is the opinion of Department Two referred to:

The COURT:

The plaintiff's right to recover in this action depended upon the question of his prior possession, and upon that question the Court found against him. * There is some conflict in the testimony upon the point, but we do not think that the evidence by the plaintiff established a case of prior possession upon which he could recover in this action.

We are unable to find any evidence to sustain the finding that the defendant entered as a preëmptioner. But it is quite immaterial whether he did or not.

Judgment and order affirmed.

[No. 7713—In Bank.]

March 10, 1882.

J. B. CHRISTIE v. BOARD OF SUPERVISORS OF SONOMA COUNTY.

CLAIM AGAINST COUNTY—PHYSICIAN'S SERVICES ON POST MORTEM EXAMINATION—BOARD OF SUPERVISORS.—The claim of the plaintiff (a physician), certified by the coroner, for "making a trip from Petaluma to Timber Grove and making a post mortem examination on the body of William Johnson and taking the stomach of said deceased to San Francisco for analysis"—was presented to the Board of Supervisors, and the Board refused to consider the claim on the ground among others that it did not give all the items as required by Section 4072 Political Code.

Held, that the objection was well taken and mandamus would not lie to compel the Board to consider the same.

APPLICATION for a writ of mandamus.

No briefs on file.

SHARPSTEIN, J.:

It appears by the certificate of the Coroner that the plaintiff was duly summoned to inspect the body, analyze the stomach, and give a professional opinion as to the cause of

the death of deceased; and that, in obedience to said summons, the plaintiff performed those services.

Upon the presentation of an account, properly made out and verified, and that certificate to the Board of Supervisors, it was the duty of that Board to allow a reasonable compensation for such services. The certificate was not conclusive as to the amount of compensation. (Ch. 81, Stat. 1872, 81.) Under the maxim *inclusio unius est exclusio alterius*, it would seem that such certificate was conclusive as to the rendition of the services. The Board refused to hear or consider this claim, on the ground, among others, that it did not give all the items of the claim. The claim is for "making a trip from Petaluma to Timber Cove, and making a *post mortem* examination on the body of William Johnson, and taking the stomach of said deceased to San Francisco for analysis."

The number of miles traveled in going from Petaluma to Timber Cove, or the length of time consumed in making the *post mortem* examination, or the number of miles traveled, or the time consumed, or the expenses incurred in taking the stomach to San Francisco for analysis, is not stated. As the Board had the power to allow such amount of compensation as it might think that he was entitled to receive, the statement of these things which we have enumerated as omitted, was necessary, in order to enable the Board to determine what amount should be allowed. And we suppose that the object of the Legislature in providing that "the Board of Supervisors must not hear or consider any claim in favor of an individual against the county unless an account, properly made out, *giving all the items*," is presented to the Board, was to have the Board furnished with sufficient *data* for intelligently determining the amount due to a claimant before even considering his claim. (Pol. C., 4,072.)

There are other reasons assigned in the answer of the respondent for not acting upon said claim, but as we deem the one to which we have referred sufficient, it is unnecessary to consider any other.

Writ discharged.

MORRISON, C. J., and MCKINSTRY, MYRICK, and ROSS, JJ., concurred.

THORNTON, J. dissented.

[No. 8252.—In Bank.]

March 10, 1882.

**SAN FRANCISCO PIONEER WOOLEN FACTORY v.
HENRY BRICKWEDEL, AUDITOR, ETC., AND SPRING
VALLEY WATER WORKS.**

WATER RATES—ORDER NUMBER 1573 ESTABLISHING WATER RATES IN THE CITY OF SAN FRANCISCO—CONSTITUTIONAL LAW.—By an ordinance of the Board of Supervisors of San Francisco known as "Order No. 1573,"—establishing water rates—it is provided that "The rates of compensation to be collected for water supplied to the city and county of San Francisco for municipal purposes shall be as follows: Fifteen (\$15) dollars per month for each and every hydrant for fire purposes and for flushing sewers. Five hundred (\$500) dollars per month for water furnished to Golden Gate Park. Seven thousand (\$7,000) dollars per month for water furnished for all the public buildings * * * due and payable at the end of the month;" and rates are also prescribed to be collected for water furnished for domestic and other purposes to private consumers. But, it is also provided that "in case the rates or compensation hereby fixed for water supplied to the city and county of San Francisco for municipal purposes shall be fully paid monthly by the said city and county to the Spring Valley Water Works, the same shall be allowed by said corporation upon the rates charged to its consumers other than the city and county, for the month succeeding the month in which the same are collected, and in such manner that the rates to such consumers for such succeeding month shall be diminished twenty-five (25) per cent., or such proportion thereof as may be collected from said city and county.

Held: The order does not fix the rates of compensation for the use of water, but leaves them indefinite and uncertain; and is therefore not a valid execution of the power conferred upon the Board of Supervisors by Section 1, Article xiv, of the Constitution.

Id.—Id.—Id.—(MYRICK, J., concurring.)—The Board of Supervisors of the city and county of San Francisco has had, since the new Constitution went into effect, and has, the power to fix and determine the rates or compensation to be collected by the Spring Valley Water Works as well from the city and county (for water used for fire purposes, for flushing sewers, for public buildings and offices, for sprinkling streets and for beautifying parks), as from private persons; any provision in any statute to the contrary notwithstanding.

Id.—Id.—Id.—**CASE EXPLAINED**—(ROSS, J., concurring.)—The construction placed on the provisions of the new Constitution in relation to water in the case of the *Spring Valley Water Works v. The Board of Supervisors of San Francisco*, 58 Cal.,—necessarily results in relieving that Company of the obligation to furnish water to the city and county of San Francisco free of charge for any purpose.

APPLICATION for writ of mandamus.

1. *Spring V. W. W. v. San Francisco*, 61 Cal. 30, 80.

Wallace, Greathouse & Blanding, for Plaintiff.

It is claimed that the Spring Valley Water Works are under obligation to furnish water free to the city in case of fire, or other great necessity, under an Act entitled "An Act for the incorporation of water companies, approved April 22, 1858"; and that the Supreme Court has determined that the words "other great necessity," apply to every municipal requirement except for the water used in the public buildings. (Statutes of 1858, p. 218, § 4; *Spring Valley Water Works v. San Francisco*, 52 Cal. 111.)

The answer to this is, that the provisions of the new Constitution above referred to, entirely sweep away Article iv of the Act of 1858, and establish a comprehensive plan controlling both individuals and corporations supplying water to municipalities and fixing their privileges, duties, and burdens. (Const. of 1879, Article xiv, § 1; also, Article xi, § 19.)

J. F. Cowdery, City and County Attorney, and for Respondent, Henry Brickwedel.

The company has no right under its charter to charge for water which it is bound to furnish free. The city has no authority to make an engagement with the Spring Valley Water Works to pay for water which it was bound under its charter to furnish free. (*San Diego Water Co. v. San Diego*, reported *infra*.)

In providing for the fixing of rates or compensation to be collected by any person, company, or corporation for the use of water supplied to any city and county, etc., section 1, Article xiv, of the Constitution does not abolish free water. It means that when water is furnished to any city and county which is not furnished in case of fire or other great necessity, such water shall be paid for at fixed and uniform rates.

An examination of Section 19 of Article xi, taken with the well known history of the water question of this State leads to the inevitable conclusion that the provisions of that section were never intended to apply to either water or gas companies in existence at the time of or before the adoption of the Constitution. That article speaks *in futuro*. Hereafter water and gas companies may take up streets and lay

down pipes in cities. Those now in existence are to stand upon existing laws.

Flournoy & Mhoon (by permission of the Court), for
"Contra Costa Water Co."

F. G. Newlands, for Spring Valley Water Works.

SHARPSTEIN, J.:

The petitioner alleges that on the first day of June, 1880, the Board of Supervisors of the City and County of San Francisco, passed an ordinance known as "Order No. 1,573—Establishing Water Rates," to take effect on the first day of July thereafter, and that by section 11 of said ordinance it is provided that "The rates of compensation to be collected for water supplied to the City and County of San Francisco for municipal purposes, shall be as follows:

"Fifteen (\$15) dollars per month for each and every hydrant for fire purposes and for flushing sewers. Five hundred (\$500) dollars per month for water furnished for Golden Gate Park. Seven thousand (\$7,000) dollars per month for water for all the public buildings" * * * "due and payable at the end of each month."

And it is further alleged that in and by said ordinance rates were also prescribed to be collected for water furnished for domestic and other purposes to private consumers.

But it was provided in said ordinance that "in case the rates or compensation hereby fixed for water supplied to the City and County of San Francisco for municipal purposes shall be fully paid monthly by the said city and county to the Spring Valley Water Works, the same shall be allowed by said corporation upon the rates charged to its consumers other than the city and county, for the month succeeding the the month in which the same are collected, and in such manner that the rates to such consumers for such succeeding month shall be diminished twenty-five (25) per cent. or such proportion thereof as may be collected from said city and county."

Since the passage of that ordinance such proceedings have been had by said Board as to entitle the Spring Valley Water

Works to have its claims for compensation for water furnished to said city and county, audited and allowed by the respondent as auditor of said city and county, provided said ordinance was valid. But it is alleged that the respondent has refused to audit and allow said claims, and that by reason thereof said Spring Valley Water Works has not allowed anything upon the rates charged to its private consumers, of which the petitioner is one, and it therefore asks the Court to compel the allowance of said claims against the city and county, in order that the Spring Valley Water Works may be compelled to proportionately diminish the rates charged to the petitioner as a private consumer of its water.

It is claimed on behalf of the petitioner that by Section 1 of Article xiv of the Constitution, it is made the duty of said Board of Supervisors to fix the rates or compensation to be collected by said Spring Valley Water Works for the water supplied to said city and county, or the inhabitants thereof, and that by the passage of the ordinance above referred to, said Board strictly fulfilled the requirement of said clause of the Constitution. But we have looked in vain for any provision of the Constitution which would authorize said Board to fix the rates to be paid by the city and county, and then, in effect, provide that if said city and county did not pay the rates so fixed for it to pay, that the same should be added to the rates fixed for private consumers to pay. Or, that in case the city and county did pay its rates or any part thereof, that the amount paid by it should be allowed to private consumers. We do not think that the language of the Constitution will admit of that construction. If it confers upon the Board the power to fix the rates or compensation which the city and county must pay to the Spring Valley Water Works, for water supplied to said city and county, it is very clear that when said rates are fixed, it concerns nobody except the Spring Valley Water Works and said city and county, whether said rates are paid by the latter or not. The ordinance under consideration simply provides that, if the Spring Valley Water Works collects any money from the city and county for water, it shall credit the amount so collected to private consumers of water. Is that fixing rates? If not, that pro-

vision of the ordinance is void, and the petitioner can claim nothing by virtue of it.

The question mainly discussed on the hearing of this case was whether, under the Constitution, the city and county is chargeable for water which, under the general incorporation law of the State, it was entitled to have furnished without charge before the adoption of the Constitution.

But that question does not arise in this case. The petitioner's right to be heard depends wholly upon the validity of the ordinance now before us. If invalid, as we think it to be, the Auditor can not be compelled to audit and allow claims for water furnished to the city under it. And that is the only question now before the Court.

Application denied.

MORRISON, C. J., and THORNTON, McKINSTRY, and McKEE JJ., concurred in the judgment.

MYRICK J., concurring :

1. In Article, xiv, Section 1, of the Constitution of 1879, it is declared that "the use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State," and "that the rates or compensation to be collected by any person, company, or corporation in this State, for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the Board of Supervisors," etc. Section 2. "The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and can not be exercised except by authority of and in the manner prescribed by law."

Before the adoption of the Constitution of 1879, there was a growing assertion on the part of interested parties, that when a franchise had been granted by the Government, it so far partook of the nature of a contract that neither its existence nor its mode of exercise could thereafter be interfered with or altered by the Legislature. The creature became and was inde-

pendent of its creator. This idea had, in some States, received the sanction of the courts.

The insertion of the above quoted provisions, and some others, in the Constitution, is a protest on the part of the people of this State against the growing assumption. The people declared, in language unmistakable, that the use of water for sale, rental, or distribution is a public use, subject to the regulation and control of the State, and that the right to collect compensation is a franchise, and can not be exercised except by authority of and in the manner prescribed by law.

This language is plain and direct, and means just what it says. It is to apply to all water for sale, rental or distribution by means of a franchise. It will control all franchises heretofore or hereafter to be granted or exercised. If any provision in any existing franchise is contrary to or assumes to give privileges or impose burdens inconsistent with this language, such provision must give way. In my opinion, then, it follows that the Board of Supervisors of the city and county of San Francisco has had, since the new Constitution went into effect, and has the power to fix and determine the rates or compensation to be collected by the Spring Valley Water Works, as well from the city and county as from private persons, any provision in any statute to the contrary notwithstanding; that the Board of Supervisors has the power to determine what amounts respectively would be proper for individuals to pay for water furnished to and used by them, and what amounts respectively should be paid by taxation for water used for fire purposes, for flushing sewers, for public buildings and offices, for sprinkling streets and for beautifying parks. The Board may fix the rates for each and all these purposes by a system of measurement, if practicable, or it may adopt any other mode which, in its judgment, will attain the required result. It may determine what sum would be a proper proportion for property to pay, through taxation, for the benefit it receives, and what sums individuals should pay for benefits they receive; and I find nothing in the Constitution which prevents the Board from relying upon the judgment of its own members in fixing such proportions.

As if to declare more certainly, if possible, that the people were in earnest in their intention to have control over franchises of this character, it is also declared in section 1, above referred to, that if any person, company or corporation shall collect water rates in any city and county, or city or town, otherwise than as established, the franchise and water works shall be forfeited for the public use.

This question of water supply and regulation in this State is much broader than local differences as between rate-payers and taxable property in San Francisco; it is co-extensive with the State, and may be co-extensive with its prospects and needs. It may be, that in dealing with the subject at large, and in laying down general rules to be applied to the water supply throughout the State, local changes will result, not to the satisfaction of all; but that is no argument against the application of the general rules, nor any reason why the will of the people, as expressed in the Constitution, should not be enforced and acted upon. In cities and counties, and cities or towns, the local governing bodies are to fix rates; in other subdivisions of the State the supply of water is subject to the regulation and control of the Legislature.

2. In the ordinance before us (Order No. 1573, approved June 10, 1880), the Board of Supervisors of the City and County of San Francisco did not fix rates or compensation for water to be furnished during the year commencing July 1, 1880, to the city and county, nor to the inhabitants thereof, as it was authorized and required by the Constitution to do. After naming sums as rates to be paid for water furnished to houses, tenements, offices, etc., and for other individual purposes, the order proceeds in section 11 to name sums as rates or compensation to be collected for water supplied to the city and county for municipal purposes, viz: fifteen dollars per month for each hydrant, five hundred dollars per month for the Golden Gate Park, and seven thousand dollars per month for all the public buildings; but at the close of that section is a clause which destroys the effect of the whole order. That clause is as follows:

"In case the rates of compensation hereby fixed for water, supplied to the city and county of San Francisco for municipal purposes, shall be fully paid monthly, by the said city

and county to the said Spring Valley Water Works, the same shall be allowed by said corporation, upon the rates charged to its consumers, other than the city and county, for the month succeeding the month in which the same are collected, and in such manner that the rates to such consumers for such succeeding month shall be diminished twenty-five per cent., or such proportion thereof as may be collected from said city and county."

This is not *fixing rates*—it is naming rates with a contingency. If the city pays, the rates to individuals are to be diminished; or, at least, there is to be a rebate. The amount, too, of the rebate is uncertain. If the city pays *so much*, there is to be a rebate of twenty-five per cent.; if it pays less, there is to be a proportional rebate. Who is to determine the proportion? Who is to determine how much will have been paid by the city, and thus ascertain the amount of the rebate? As we said above, this is not *fixing rates*. To fix is to establish, to settle, to determine, to limit, to define. To name a sum to be paid, with some uncertain amount to be repaid upon a contingency, is not a fixing of rates. In the first place, the order goes on to name rates to be paid by individuals and thereby names the amounts they ought properly to pay, respectively, for water used by *them*; and then says, if some one else, viz: the city and county, shall pay the sums which ought to be paid by it, and that promptly, month by month, then, in that case, the sums named to be paid by individuals are too large, and there shall be a rebate.

That kind of legislation is too uncertain to be called legislation. As well might the Board have said, if Mr. A. shall pay his water bills at, say five dollars per month, Mr. B.'s bills shall be five dollars; but, if Mr. A. shall not pay his bills in full, Mr. B. shall pay a proportional increase.

The Constitution is very plain and direct in its provisions. The Board of Supervisors is to fix the rates or compensation for the use of water to be supplied to the city and county; the Board is, also, to fix the rates or compensation for the use of water supplied to the inhabitants of the city and county; the Board is to fix—not leave indefinite and uncertain. Until there shall have been a fixing of rates, according to the Constitution, I do not see how the city and county can be

compelled to pay ; neither do I see how the city and county can be compelled to do an act in furtherance of the uncertainty created by the ordinance.

Ross, J., concurring:

The purpose of this proceeding, as explained by all parties, is to obtain a determination by this Court of two questions—first, whether or not the Spring Valley Water Works is now under the legal obligation to furnish water to the city and county of San Francisco free of charge for any purpose, and second, whether or not the so-called Bayly ordinance is valid. Both questions have been elaborately argued, a decision on both requested by all parties, and as the questions are of public, as well as of private interest, I think they ought now to be determined.

As respects the first, I am of the opinion that the construction placed by a majority of the Court on the provisions of the new Constitution in relation to water, in the case of the *Spring Valley Water Works v. The Board of Supervisors of the City and County of San Francisco*, 7 Pac. C. L. J., 614, necessarily results in relieving that company of the obligation to furnish water to the city and county of San Francisco free of charge for any purpose. I dissented from that construction, and, in an opinion filed at the time, stated why I thought that result would follow the construction then adopted by the majority. Subsequent reflection and investigation has but confirmed and strengthened the views I then expressed. I thought then, and think now, that by incorporating and availing itself of the privileges conferred by the Act of 1858, the Spring Valley Water Company entered into a *contract* with the State by which it agreed, among other things, to furnish water to the extent of its means, to the city and county of San Francisco free of charge, in case of fire or other great necessity—which latter terms, it has already been determined by this Court, included all water necessary for sprinkling streets, watering public squares and parks, for flushing sewers and for all like purposes beneficial to the public ; and, as a part consideration for this agreement on the part of the company to furnish water free of charge for those purposes, the State agreed that the company should

be entitled to furnish pure, fresh water to such of the inhabitants of the city and county as should wish to take it, for family uses, at reasonable rates and without distinction of persons, upon proper demand therefor—such rates to be determined by a majority of a Board of Commissioners, to be selected: Two by the city and county and two by the water company; and in case of the inability of the four to agree to the valuation, then the four to choose a fifth person, who should also become a member of the Board; and in the event of the inability of the four commissioners to agree upon a fifth, then the sheriff of the county to appoint such fifth person. (Act of April 22, 1858, Stats. 1858, p. 219.) Whether the rates which would be fixed by a board so constituted, would be higher or lower than those fixed by the Board of Supervisors, is a question with which the Court has nothing to do.

That the manner of fixing the rates was as much a part of the agreement between the Company and the State as was the agreement to furnish the public water for certain purposes free of charge, is, to my mind, beyond any and all question. Both the right and the obligation arose out of contract and out of contract alone, and the one formed an important part of the consideration for the other. This contract, relating as it did to property rights—to the disposition of the water the Company owned—was, in my opinion, beyond the reach of subsequent legislation, statutory or constitutional. But a majority of my associates were of the opinion that the provisions of the new Constitution applied to this Company, and annulled its right to have the water rates fixed in the manner provided by the Act of 1858; and the Court so determined. It having been thus decided that the provisions of the new Constitution apply to the Spring Valley Water Company, it seems clear enough that the obligation on the part of the latter to furnish water free for any purpose, no longer exists. It certainly can not be said that the provisions of the Constitution apply to this Company for one purpose and not for another—that so far as a burden is imposed, they apply, but so far as a right or privilege is granted, they do not apply. To so hold, would not only be to adopt a rule of construction altogether new and manifestly unjust, but it

would also be in direct contravention of that provision of the Constitution itself which declares that its provisions are mandatory and prohibitory, unless by express words they are declared to be otherwise.

Applying, then, the provisions of the Constitution to the Spring Valley Company, we find that Company clothed by the nineteenth section of the eleventh article, with the privilege of introducing into and supplying "the city and county of San Francisco and its inhabitants * * * with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

Elsewhere in the same section the Company is charged with the payment of damages to persons injured by laying of pipes, etc., but with this exception, the *sole condition* here imposed on the Company, in granting to it the privilege of introducing and supplying the *city and county of San Francisco* and its inhabitants with fresh water for domestic and *all other purposes*, is that the *municipal government shall have the right to regulate the charges thereof*. And this provision is followed up by Section 1 of Article xiv of the Constitution, in which it is declared that the rates of compensation to be collected for water *so supplied shall be fixed*, annually, by the Board of Supervisors, by ordinance, which shall continue in force for one year and no longer. Such ordinances are required to be adopted in the month of February of each year, and to take effect on the first day of July thereafter; and it is further provided that if the Board fail to pass such ordinances within such time, it shall be subject to peremptory process to compel it to do so, at the suit of any party interested, and shall, also, be liable to such further process and penalties as the Legislature may prescribe.

These provisions of the Constitution applied to the Spring Valley Water Company, as they must be under the decision to which allusion has been made, leave no doubt in my mind that the Company has thereby become entitled to receive compensation for all water furnished the city and county, to be fixed in the mode pointed out in the Constitution itself

The question remains: Does the Baily Ordinance fix the

rates or compensation to be collected for the use of the water supplied to the city and county and the inhabitants thereof? With the reasonableness of the rates or compensation the Courts have nothing to do. That is a matter for the Board of Supervisors, although, of course, the Constitution contemplates that the rates or compensation to be established shall be fair and just—just to the company furnishing the water, and just to those who use and have the benefit of it. But when the Board undertakes to fix the rates or compensation it *must do so*. To make the rates or compensation depend on a contingency or on contingencies, as does the ordinance in question, is not to *fix* them. Fixed means settled; established; firm. To say that certain rate-payers shall pay certain sums, *provided* the city and county shall pay a certain other sum or sums, in which event the amounts to be paid by the rate-payers shall be proportionately reduced, is not to *fix* anything, and does not answer the requirement of the Constitution, which, as I understand it, is that the Board of Supervisors shall by ordinance declare absolutely, independent of conditions and irrespective of contingencies, the rates or compensation to be collected by the Water Company for the use of water supplied to the city and county and to the inhabitants thereof. When so fixed, the Company is as much entitled to collect the amount from the city and county as from the inhabitants.

I concur in the judgment denying the writ.

[No. 10,711.—In Bank.]

March 10, 1882.

EX PARTE KOSER.

SUNDAY LAW—CONSTITUTIONAL LAW—POLICE POWER—HEAD LINES OF TITLES AND CHAPTERS OF CODES—STARE DECISIS—FREEDOM OF RELIGION.—The Sunday law (§§ 300, 301 Penal Code) is not unconstitutional. (McKINSTRY, J., ROSS, J., and SHARPSTEIN, J., dissenting.)

ID.—ID.—ID.—ID.—ID.—ID.—CASE DISTINGUISHED.—*Ex parte Westerfeld*, 55 Cal. 550, distinguished.

APPLICATION for a writ of *habeas corpus*.

1. *Ex parte Lichtenstein*, 67 Cal. 361.

CAL. REPS. LX—12

T. H. Laine, for Petitioner.

The sole question to be considered and determined in this case may be stated in a few words, viz: *Is the law found in the Penal Code of this State at sections 300 and 301 constitutional?* The petitioner affirms that it is not.

The Penal Code was passed April 14, 1872, and repealed all Sunday laws then existing. This Code had a chapter in it composed of fragments of the various statutes we have called attention to, together with fragments of other laws before that time passed, that had no reference to Sunday either as a day of rest or a day devoted to religious matters.

That chapter is Chapter 7, of Part 1, Title 9, of this Penal Code, and bears this title, viz: "Of Crimes against Religion and Conscience, and other offenses against Good Morals." It consisted of nine sections—a most heterogeneous mass of matter. We have no State Religion, and consequently no crimes against religion cognizable by the State. A crime against conscience would also be something of a curiosity.

A law is a rule of action or of civil conduct, and not so many pages, lines or sections in a statute book; and every such rule is a distinct law. In this chapter of nine sections, therefore, there are contained seven distinct laws on seven distinct subjects, viz: 1. Sec. 299—a law against improper amusements on Sunday where liquors are sold. 2. Secs. 300 and 301—a law against keeping open places of business on Sunday. 3. Sec. 302—a law against disturbing religious meetings. 4. Sec. 303—a law against the sale of liquors at theatres, etc., by women. 5. Secs. 304 and 305—a law against the sale of liquors at camp meetings. 6. Sec. 306—a law against procuring females under seventeen years old to play musical instruments in certain public places. Sec. 307—a law against procuring a female under seventeen years old to exhibit herself for hire.

We are prepared to admit that under the old Constitution, and perhaps under the new, a Sunday law could be enacted that the Courts would uphold. We concede that by an overwhelming weight of authority such a law can be passed without interfering with the rights of conscience or religious liberty. But we insist that such Sunday laws are all founded

upon a different theory than the one under consideration; that is to say, that they are all founded either upon the theory that the day should be observed as a holy day, set apart to religious duties, upon which no secular business should be done, unless it be works of necessity or charity; or upon the theory that there should be a day of rest set apart and maintained under the police power of the State. But this law is of neither character. It does not devote the day to any sacred purpose; it does not prevent the doing of any secular business whatever; nor does it give, or pretend to give, rest to man or beast. The crime it proposes to create does not consist in opening places of business nor in keeping them open, nor does it consist in performing labor or doing business; but in keeping open certain places of business for the *purpose* of doing business; and in its exceptions labors of necessity and charity are overlooked and unprovided for.

This code, by its heading or title of the chapter, shows that it was not intended to set apart a day of rest nor a day on which secular business was to be prohibited. It declares no business nor the doing of any, wrong or illegal, on that day. It is, therefore, in no just sense a law, but an unauthorized and wanton legislative interference with the reserved rights of the citizen, and as we submit, in violation of the first section of the bill of rights of the old Constitution, which says "All men are by nature free and independent, and have certain *inalienable* rights, among which are those of *enjoying* and defending life and *liberty*, acquiring, *possessing* and *protecting* property, and *pursuing* and obtaining *safety* and *happiness*," and of these rights this law is an abridgement for no just or legal cause.

We submit that the law is unconstitutional and void, as being in open and direct violation of § 25 of Art. ii, which reads, so far as material here, as follows: "Sec. 25. The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say, * * second, for the punishment of crimes and misdemeanors." It is most clearly a special law within the meaning of our constitution, as settled by this Court in *Ex parte Westerfield*, 55 Cal. 550. We defy any one by any course of fair reasoning to sustain this law, if the bakers' Sunday law in that case considered was a

special law, such as our Constitution forbade the enacting of; and we have no doubt that it was. This law, we submit, is much more bald in that respect than the bakers' law.

Again, as to its being a special law, see the clear statement of Justice Myrick on that point, found in *Earle v. S. F. Board of Education*, 55 Cal. 494-5.

But this law is equally unconstitutional and void as being in plain and direct violation of the latter clause of Art. 1 Sec. 21. The whole section reads:

"No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the Legislature; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens."

Privilege, special, means pertaining to or constituting a species or sort limited in range, means to grant some particular right or exemption, to invest with a peculiar right or immunity, as to privilege a representative from arrest, to privilege officers and students of a college from military duty. Immunity means freedom from arrest and the like, or to give a peculiar privilege. Now this statute divides the citizens, or people of the state into various classes, viz: store keepers, bar keepers, hotel keepers, boarding house keepers, barbers, bath keepers, saloon keepers, bankers, market keepers, restaurant keepers, livery stable keepers, and retail drug store keepers, and it grants to some of these classes the privilege of keeping their places open on Sunday for purposes of business and gives to them also an immunity from arrest, while it denies the same privilege to others and subjects them to arrest. (Cooley's Constitutional Limitations, 4th Ed. 488, 494.)

That this law binds no section of the great body of the people is evident from the fact that while it was enacted much as it now stands as early as 1858, yet during all these years it has remained a dead letter on the statute book. The reason is that it is opposed to the letter and spirit of our institutions. And even now the great mass of the people have no respect or love for it. Only a few belonging to a single class, namely, temperance people, so called, in some of the small towns and out lying places, are making a clamor about it.

Garber, Thornton & Bishop, also for Petitioner.

This case falls within the class which are to be decided upon principle, rather than according to the mere weight of authority. This is so even as to the invocation of the doctrine of *stare decisis* based upon prior adjudications by this Court—a *fortiori*, as to the effect to be given to the decisions and opinions of other Courts and Judges. (*Willis v. Owen*, 43 Tex. 48; *Houghton v. Austin*, 47 Cal. 666.)

The law in question, even if general and uniform in its operation, would have been unconstitutional. So far as adjudication has been had in this State, this question has been decided both ways; and we submit that, authority aside, the better reasoning is that of *Ex parte Newman*. The question is summed up by Cooley, who is quoted as authority for the validity of the law in the last California opinion. But we submit that a fair construction of the text of Cooley rather leads to the inference that such laws are *only* sustainable on authority, and that if the question were *res integra*, and the point to be decided upon principle, the opposite conclusion would be reached. For after stating the two grounds upon which laws prohibiting ordinary employments on Sunday, are to be defended, viz: First, as laws against the desecration of the *Christian Sabbath*, and, second, as an exercise of the police power establishing sanitary regulations, he says: "The Supreme Court of Pennsylvania have preferred to defend such legislation on the second ground rather than the first; but it appears to us that if the benefit to the individual is alone to be considered, the argument against the law which he may make who has already observed the seventh day of the week, is *unanswerable*." And as to the first ground, he says: "But the Jew who is forced to respect the first day of the week, when his conscience requires of him the observance of the seventh also, may plausibly urge that the law discriminates against his religion, and by forcing him to keep a second Sabbath in each week, unjustly, though by indirection, punishes him for his belief." Then he adds, however, that on this ground, the law must be based upon the ground that it only requires the proper deference and regard which those not accepting the common belief must pay to the pub-

lic conscience, and that *upon that ground*, these laws are supportable *by authority*. (Cooley Con. Lim., p. 594.)

It seems to us necessary to a clear understanding of these questions, to keep distinct the different grounds upon which these Sunday laws have been sustained, and that only confusion can result from the blending of them together in one view. If a law, for instance, were enacted requiring a cessation of all labor on Monday and Tuesday of each week, according to the views of Judge Cooley, it could not be sustained at all, because the *only* ground upon which he puts the validity of Sunday laws would be entirely wanting. According to him the argument of those who chose to observe some other day of the week, against such a law would be unanswerable. On the other hand, in many of the cases usually cited in support of the constitutionality of these laws, the opposite view is taken.

In so far as it may be urged that this law derives any support from the fact that it sets aside Sunday, rather than another day as a period of enforced idleness, we submit that both on principle and authority, at this day, the contention cannot be deemed even plausible; and that what Judge Cooley calls a plausible argument is in fact an unanswerable one—such a law does give a preference to our religion, and does indirectly punish all but a certain favored class for their belief.

But, as is said by Mr. Justice McKinstry, by some Courts “these laws have been sustained as simply requiring a periodical cessation of labor—the power to pass them resting upon the right of the Legislature to pass laws for the preservation of health and the promotion of good morals.”

And Mr. Justice Field, in *Ex parte Newman*, sustains the law as a proper exercise of the police power, saying that the Legislature can pass laws for the preservation of health and the promotion of good morals—that capital unrestricted by law will exact so much work as to injure the laborer—that the fact that the civil regulation accords with the divine law and the opinions of the majority, affords no argument against it—that the law against homicide is not less wise, because the Divine Command is “Thou shalt do no murder;” and that

with the motives of the Legislature, the Courts have nothing to do.

Following out this line of reasoning, we suppose, it must be held that the Legislature may enact that whenever a man is struck on one cheek he must turn the other—that it shall be a misdemeanor to swear by the earth, or to give alms except in secret, or to pray standing in public, or to wear golden ornaments, or to invite to a dinner any but the poor, the maimed, the lame and the blind. For each and all of these things, it might as well be urged that they came within the police power, as that such power justifies the enforced observance of Sunday as a day of rest. If it were to-morrow proposed to compel by law the cessation of all business on Monday and Friday of each week, would any Court uphold such a statute? And yet, the religious sanction aside the difference between such a law and the Sunday law, would only be one degree. If it once be admitted that the Legislature has power to thus provide for the public health and good morals, where is the limit to its exercise? And if the public health can thus be provided for, what the objection to laws prohibiting the use or the culture of tobacco, or even tea or coffee, as injurious to health—to laws regulating the number of hours in each day, during which grown men of sound health may labor? If the question were of the first impression, and entirely unaffected by religious feelings, and it were proposed now for the first time to set apart each Monday as a day of rest, would not all agree, as a plain dictate of common sense, that such a law does not fairly fall within the limits of the police power—that it is not necessary for the public health or morals that any such a restriction on the freedom of individuals should be imposed—that such a regulation is entirely outside the scope of legislative power? That there would be just as much propriety in enacting the number of hours out of the twenty-four during which all should sleep, on pretense of compelling a restoration of exhausted energies, as in prescribing the number of hours in every week during which all must refrain from their ordinary avocations?

We think it is fair to infer from his later opinions that Judge Field would now materially modify the views expressed by him in *Ex parte Newman*; (*Missouri v. Illinois*, 4 Otto, 142.)

The pretext is that experience has demonstrated that one day's rest in seven is needful to recuperate the exhausted energies of body and mind. In point of fact, experience has demonstrated no such thing. How much, and when a man should rest, depends upon the kind of work he does and his habits, and a variety of considerations. But this law does not compel this weekly cessation of labor. If it is to be justified as resting upon a legislative adjudication that one day's rest in every seven is necessary—if that is the *principle* upon which it rests, then the Court, in order to sustain it on that ground, must be able to see that the principle is carried out in the enactment. For example, if any class of the community can be said to stand in need of this fatherly protection of the law, it is the operatives in factories, who, as Judge Field says in *Ex parte Newman*, are the slaves of capital. But by this statute they are left absolutely unprotected. From the whole scope of the statute, it is perfectly evident that the ground upon which it is sought to be sustained as a police regulation, was entirely absent from the minds of the framers. It was as it purports to be, a law to punish crimes against religion and conscience—to compel, in the language of Judge Cooley, a decent deference and respect to the public conscience, and to prevent the desecration of a day which a particular creed declares shall be remembered to keep it holy. Consequently its prohibitions are directed, not against working too much, not against the failure to recuperate the exhausted energies by needed rest; but against the publicity and openness with which that work may be prosecuted. As Judge Field says, had the statute contemplated a mere sanitary regulation, it would have been made applicable to all who might be injured by undue application to labor—at the least, the exceptions would only have embraced those who, from the nature of their avocations could take the needed rest at other periods, or whose ministrations on Sunday are absolutely imperative. As said in *Ex parte Maguire*, the law-making power of the State is ample to make laws affecting all sects alike, and not inhibited by the Constitution, which will accomplish the object so much talked about—the prevention of a too incessant application to worldly affairs.

The provisions of the new Constitution against special leg-

islation apply with equal force to statutes passed prior to its adoption, as to those subsequently adopted. (*Matter of Oliver, etc.*, 21 N. Y. 12; *Bensley v. Ellis*, 39 Cal. 313.)

The evil to be guarded against—the mischief to be remedied, was not the mere act of voting for such laws, but the partial and unjust operation of such laws when passed. What the framers of the Constitution intended was to prevent the unfairness and injustice resulting from the unequal operation of the laws, and every special law, whether passed before or after the adoption of the Constitution, was equally within its intent and spirit. Equally too within its letter. It says, the Legislature shall not pass special statutes, and all statutes heretofore enacted inconsistent with this provision shall be void. Is not this substantially the same as saying, the provisions and inhibition of this Constitution shall equally apply to existing as to subsequent statutes? What motive could the framers of the Constitution have had in denying to this provision a retrospective operation? If the nullification of the existing statute, could divest a vested right, or impair the obligation of a contract, or otherwise work an injustice, the case might be different; but all such consequences are guarded against by other provisions. (*Mitchell v. Hagenmeyer*, 51 Cal. 108; *Broom's Maxims* pp. 35-6; 10 Otto, 307; 13 Id. 389.)

The only argument advanced, we believe, in the cases cited to show that existing special laws are saved, is that it could not have been the intention to annihilate at one fell swoop the vast body of existing special legislation. But why not? If it was well to prohibit future Legislatures from perpetrating these enormities, was it not equally wise to abolish those already perpetrated, saving only as is done, vested rights, etc.?

The statute is in conflict with the provisions of the State Constitution—that all laws of a general nature shall have a uniform operation—and with the Fourteenth Amendment to the Constitution of the United States.

In so far as experience has demonstrated that the public health demands exactly one day's rest in seven—in so far as this legislation is based upon and justified by this consideration, the occasion, the justification, and the legislative action, are

all general in their nature. It is not because excessive devotion to business is deleterious in one locality, under particular circumstances, or to particular classes or individuals; but because all are so constituted as to require this relaxation, that this law is to be submitted to. It must, then, have a uniform operation, or it can legally have no operation.

Now, it seems to us that in determining whether its operation is uniform, we need only ask whether it bears upon all who fall within the reasons alleged for its enactment. If the only reason which can be given to justify the law be one which equally applies to every member of the community, then it can not fairly be said to operate uniformly, unless it operates equally and impartially upon every member of the community. If the reason be a religious reason—if the law is to be upheld because it is within the power of the Legislature to compel the observance of the divine command to remember this day and keep it holy, then all should be compelled alike. And so if the object be the public health. (16 Wall. 97; *Pell v. Newark*, 40 N. J. L. 80; *Holden v. James*, 11 Mass. 396; *Kelley v. The State*, 6 Ohio St. 272; *Mayor v. Dearman*, 2 Sneed. 122; *Wally's Heirs v. Nancy Kennedy*, 2 Yerg. 554; *Bank v. Cooper*, 2 id. 599; 2 Coke's Institute, 51; Cooley Con. Lim. 492; *Omnibus R. R. Co. v. Baldwin*, 6 P. C. L. J. 763; *Parrott's Case*, 5 P. C. L. J., supplement.) We have seen that while a formidable looking array of authorities can be marshalled in support of Sunday laws of uniform operation, that the supporters of such laws are by no means agreed on any one principle upon which they can be rested; and that Judge Cooley, who is the most recent and generally esteemed the most authoritative exponent of this branch of the law, hardly attempts to justify such legislation on principle, and so far as he goes, repudiates the idea that it is within the police power, and puts it on the sentimental and religious idea connected with the observance of the Sabbath as a matter of conscience. The thought thus avowed by Judge Cooley, though not always put forward, underlies and accounts for the whole course of judicial action on this subject. As a rule, the Judges have carried with them to the bench the impressions of early religious and Christian training. We all know how difficult it is for any one to divest himself

entirely of the bias thus resulting—how slowly the most enlarged and enlightened understandings have practically embraced and carried out the philosophy of perfect religious freedom and toleration. We do not have to go very far back to the times when the best men justified and enforced laws working all kinds of disqualification, punishment and disfranchisement for nonconformity in matters of conscience.

But it is time that the law shall take the most advanced ground on these questions, and that Courts shall recognize the fact that the cause of true religion is always injured and never advanced by calling to her aid the sanctions and punishments and rewards of secular authority.

J. H. Campbell and John Reynolds, for the People.

We do not understand that the petitioner makes any question that the law, as it stood at the adoption of the present Constitution, was constitutional and valid, as held by repeated decisions of the Courts of last resort in this and other States. And as to that proposition we are satisfied to submit the case upon the opinion of the learned Chief Justice in *Ex parte Burke*, Cal. and the cases there cited.

It is claimed, on the part of the petitioner, that the law under which he was convicted consisted of Sections 300 and 301 of the Penal Code, and that the amendment to Section 301 in 1880, operated as a re-enactment of both sections.

The Act of 1880, amending Section 301, makes no reference in its title to Section 300, and deals only with the exception in Section 301, adding a *proviso* which limits the exception, as to certain of the classes named in the section amended.

We submit, if the Legislature had no power under the present Constitution to pass Section 301, its action was void, and it left the Code as it stood before. Or if, as claimed, Section 301 could not be amended as it was, without also re-enacting Section 300, then the Act of 1880 was void for want of a proper title, and the Code was unaffected by it. (*Leonard v. January*, 7 Cal.) The law under which petitioner was convicted, whether it consists of Section 300 alone, or of the two sections together, either as they stood before, or as they existed after the amendment of 1880, is not violative of any provision of the present Constitution, even if

the law had been passed under it or re-enacted after its adoption.

The law is not local or special. It certainly is not local, for it operates alike all over the State. It is not special in the sense in which that term is used in the Constitution. A general law, uniform in its operation, is one which is public, and affects alike all persons in the class to which it relates. There is nothing in conflict with this in either of the opinions in *Ex parte Westerfield*, 55 Cal. 550. There the Act was held to be special because it discriminated between certain persons of the same class and pursuing the same business.

"Special," is opposed in signification, to "general." And so when we get the definition of a general law, whatever comes within that definition is not a special law. That this is a general law operating alike all over the State, *quod* the classes of persons to which it applies, is made very clear by the opinion of the learned Chief Justice in *Ex parte Burke*.

Nor does this statute grant any privilege or immunity to any citizen or class of citizens which, upon the same terms and under like circumstances, may not be enjoyed by all citizens.

Article i, Section 21, of the present Constitution, is but an express definition of Section 11, Article i, which is the same as the corresponding section of the old Constitution. (*Brooks v. Hyde*, 37 Cal. 377.)

THORNTON, J.

The petitioner, Koser, was convicted of keeping open a saloon on Sunday, November 9, 1881, for the purpose of transacting business therein, contrary to the provisions of Section 300 of the Penal Code. He was sentenced under this conviction and imprisoned, and sued out this writ to be discharged from such imprisonment as unauthorized by law.

The legality of the imprisonment depends on the constitutionality of the laws known as the Sunday laws, which are comprised in Sections 300 and 301 of the Code above cited. These sections are as follows:

"300. Every person who keeps open on Sunday any store, workshop, bar, saloon, banking-house or other place of business for the purpose of transacting business therein, is punishable by fine not less than five nor more than fifty dollars.

"301. The provisions of the preceding section do not apply to persons who, on Sunday, keep open hotels, boarding houses, barber shops, baths, markets, restaurants, taverns, livery stables or retail drug stores, for the legitimate business of each, or such manufacturing establishments as are usually kept in continued operation; provided, that the provisions of the preceding section shall apply to persons keeping open barber shops, bath houses, and hair-dressing saloons, after twelve o'clock M. on Sunday."

Most of the questions arising in this case were passed on in *Ex parte Andrews*, 18 Cal. 678. The statute considered in the case cited was for the greater part the same as the sections of the Penal Code above quoted. The principal difference between them is the addition of the proviso in Section 301, which was inserted by an act of the Legislature approved April 15, 1880.

It is urged that this statute is a special law, and is violative of the second subdivision of Section 25 of Article iv of the Constitution of this State. This section and subdivision prohibit the Legislature from passing special laws "for the punishment of crimes and misdemeanors." It is also urged that it violates the last clause of Section 21 of Article i of the Constitution, which is as follows: "Nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens;" and it is further said to be violative of Section 11 of the same Article, prescribing "that all laws of a general nature shall have a uniform operation."

As is said by Judge Cooley, in his work on Constitutional Limitations, "the Legislature is to make laws for the public good," and further, "that what is for the public good, and what are public purposes, and what does properly constitute a public burden, are questions which the Legislature must decide upon its own judgment, and in respect to which it is vested with a large discretion which cannot be controlled by the Courts, except, perhaps, when its action is clearly evasive, and where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful." (Cooley's Con. Lim., 156-7.)

The offense defined in the sections of the Code above quoted

is of the class *mala prohibita*. Independent of statute, it is not an offense, and the Legislature in making the sections was merely adding to the class of public offenses which it deemed expedient should be prohibited by statute. In making the exception in 301, it merely declared that in its judgment, there was something in the nature of the callings specified in such section, which rendered it improper to include them within the act. The exclusion made by Section 301 was not arbitrary and the discrimination was reasonable. It was very easy to perceive that there are features in the character of the callings referred to in Section 301, and in their relation to the community in which they exist, which render such exclusion proper, and one upon which the Legislature might wisely exercise its judgment in leaving them unaffected by penal enactment. Certainly, the Legislature is intrusted with an enlarged discretion to determine what shall be punished criminally and what shall not be, to fix upon what shall be put in the class of *mala prohibita*, and what shall not be included.

It is consistent with this view, to conclude and hold that such a law is a general one, uniform in its operation, and that by it no privilege or immunity is granted so as to bring it in conflict with the clause of the Constitution above referred to.

The classification made in Section 301 is based on reasonable grounds, and, as has been above remarked, is not arbitrary. This will be readily recognized when we compare the callings excluded from prohibition with those made subject to it, so far as they are specifically mentioned in Section 300. Let a comparison be made between hotels, boarding houses, barber shops, baths, markets, restaurants, taverns, livery stables and retail drug stores, specified in Section 301, and stores, workshops, bars, saloons and banking houses, specified in Section 300, and a difference in their essential features, as regards society and the health and comfort of those who constitute a community, will be at once admitted. Unless such a distinction is made, as has been by the provisions of Section 301, the Legislature, in endeavoring to preserve the health and physical well-being of the members of a community, would be exercising its power so as to put it in *peril*.

The circumstance that the callings excluded appear to form an exception from a general law in the shape which the legislation has taken, has given rise to the idea that the law contravenes the provisions of the Constitution. If the law had specified the kinds of business to which the prohibition extended, without mentioning those excluded, we do not think that the impression of its invalidity as conflicting with the paramount law, would have so taken possession of the minds of those who urge its unconstitutionality.

To hold such enactments unconstitutional and void would, in my judgment, impose an unwarrantable restriction on the legislative power. A kindred power is exercised in fixing the grades of criminality, as in the distinction between petit larceny and grand larceny, and classifying homicide and arson by degrees of criminality and affixing to each a different degree of punishment. Such a power is exercised in Section 304 of the Penal Code, where the act of erecting or keeping a booth, tent, stall, etc., for the purpose of selling or otherwise disposing of wine or spirituous or intoxicating liquors within one mile of any camp or field meeting, for religious worship, during the time of holding such worship, is made punishable by fine. Why confine the operation of such enactment to one mile? Why not extend it to one mile and a quarter? The Legislature is allowed to exercise its judgment as to the distance, and properly so.

Declaring the provisions of the sections referred to invalid as violative of the Constitution, would be to strike at the foundation of the legislative power to determine what acts, of those not *mala in se*, shall be punished criminally, and what shall not be punished. In most cases acts not *mala in se* are by statute declared penal offenses, while acts, apparently of a like nature, are not declared to be penal. What other power than the Legislature can or should draw the line, on one side of which is liability to punishment, and on the other side no such liability is incurred.

We are referred by the learned counsel to the case of *Ex parte Westerfield*, 55 Cal. 550, as determining the question that the law in question is a special law. The distinction between the Statute passed on in that case and the Sections 300 and 301 of the Penal Code is palpable. The former selected

a particular class, viz., "persons engaged in the business of baking for the purpose of sale," and forbade them from laboring during a specified period. This was clearly a special law, and was properly held to be so. Every one engaged in any other calling or profession was permitted to labor. It may be further said that the discrimination by such act was not made on any reasonable grounds, but appeared to be entirely arbitrary. We observe nothing in the case cited in conflict with the views above expressed.

The contention that the "statute under consideration is in conflict with Sections One (1) and Four (4) of the first Article of the Constitution, was discussed and passed on in *Ex parte Andrews*, above cited. A statute, so far as the question to be passed on here is concerned, similar to the sections of the Penal Code above cited, was before the Court in that case, and its constitutionality was sustained. We concur in the views there expressed as to this matter, and deem it unnecessary to say anything further as to this contention.

As to the headings of the chapters in which Sections 300 and 301, Penal Code, are found, we cannot on a full consideration of them see anything to lead to a different conclusion from that reached therein. Granting that they may be resorted to to determine as to the correct interpretation of the sections included in the chapter (and nothing further, in our opinion, is determined in *Barnes v. Jones*, 51 Cal. 305), we cannot perceive that their headings are conclusive of the question of power of the Legislature to pass such statute. The Legislature may hold their power to enact a statute to be derived from a clause or section of the Constitution, which does not confer it. But such error would not render the law so passed unconstitutional, if the power to enact it was conferred by the organic law.

In my opinion the Act above referred to is constitutional, and the petitioner should be remanded to the custody of the officer.

MORRISON, C. J., concurring:

I concur in the judgment remanding the petitioner, and adhere to the views expressed by me in *Ex parte Burke* (59 Cal. 8)

MYRICK, J.:

For the reasons given by the Chief Justice in *Ex parte Burke*, opinion filed October 31, 1881, in the dissenting opinion in *Ex parte Newman*, 9 Cal. 502, in the opinion of this Court in *Ex parte Andrews*, 18 id. 678, and *Ex parte Bird*, 19 id. 130, I think the petitioner should be remanded. Field, J., in *Ex parte Newman*, used the following language:

"The Legislature possesses the undoubted right to pass laws for the preservation of health and the promotion of good morals, and if it is of opinion that periodical cessation from labor will tend to both, and thinks proper to carry its opinions into a statutory enactment on the subject, there is no power, outside of its constituents, which can sit in judgment upon its action. It is not for the judiciary to assume a wisdom which it denies to the Legislature, and exercise a supervision over the discretion of the latter. It is not the province of the judiciary to pass upon the wisdom and policy of legislation; and when it does so, it usurps a power never conferred by the Constitution."

The people of this State, through their Legislature, have declared in favor of the wisdom and policy of the law in question. They have declared their wishes in the matter. If the people now wish a change, if the public sentiment is now other than it was, there is a plain, speedy and adequate remedy, viz., by a repeal or modification of the law. The Courts should not declare a statute unconstitutional, unless it be clearly so; where there is a doubt, that doubt should be solved in favor of the expressed wishes of the people as given in the statute.

I think it was competent for the Legislature to declare, as it has done in Section 301 of the Penal Code, that the good of society, public morals and health, will be promoted by exempting hotels, boarding houses, barber shops, baths, markets, restaurants, taverns, livery stables, retail drug stores, and such manufacturing establishments as are usually kept in continued operation, from being affected by Section 300, and that society, as it is constituted, needs the continued use of such places for its well being. Whatever may be individual opinion from a religious standpoint, I cannot say, as a matter of

law, that a man will not be more benefited by bathing or by being shaved, or by having meals, or a drive, on Sunday, than he will by visiting a store, saloon or banking house. Such distinctions are for the consideration of the Legislature.

The religious element which is brought into the discussion or all these questions, by those who take extreme views on either side, has no proper place in this case. In some States Sunday laws are upheld from a religious point of view; in others from a secular point of view, only. In this State, the policy of the law, as indicated in the decisions, is fully committed to the secular phase of the subject, only. Therefore, there is no occasion to continually bring forward and urge the religious phase.

As to the effect to be given to the title and head line of the section in question: The Act considered by Field, J., and by him held good, in *Ex parte Newman*, was entitled "An Act to provide for the better observance of the Sabbath;" the Act sustained by this court in *Ex parte Andrews* and *Ex parte Bird*, *supra*, was entitled "An Act for the observance of the Sabbath." It is claimed, however, that greater force is to be given to head lines in the Codes than to the titles of Acts. The head line of Title ix of the Penal Code, containing the sections before us in the case at bar, reads: "Of crimes against the person and against public decency and good morals." The head line of the chapter reads: "Of crimes against religion and conscience, and other offenses against good morals." If there be any difference in substance between the titles of the former Acts and the head lines in the Code, it is in favor of the sections in question, because we may strike out the words "against religion and conscience and other offenses," in the head line to the chapter and leave it reading: "Of crimes against good morals" thus disregarding objectionable words, and retaining words and intentions unobjectionable. No Court has ever held that the Legislature may not pass laws to protect good morals. Whether good morals will be protected by cessation from secular employments on one day of the week, is for the Legislature to determine.

The head line of the title has no reference to religion, and does not indicate that the Legislature had religion in view; if the head line of the chapter is a part of the sections follow-

ing, and influences their construction, the head line of the title is still larger and more comprehensive, and should also be considered.

It may be added that the sub-head line of the chapter, relating to Section 300, reads:

"300. Keeping open places of business on Sunday," here again omitting the word "religion."

It may be that the Legislature, in inserting the words "against religion and conscience," in the head line of the chapter, had in mind Section 304, prohibiting the selling of liquors and other merchandise at any camp or field meeting for religious worship, and Section 302, prohibiting the disturbance of religious assemblages or worship. We cannot, as a matter of law, say that it did not intend to restrict the application of the word "religion" to those sections only. If the effect is to be given to head lines, which is claimed in this case, many of the provisions of the various codes must be held to be nugatory.

McKEE, J.:

I concur. Whatever may be urged against the policy of the law which is called in question in this case, is not a matter for the consideration of the Court. The policy or impolicy of the law belongs to the Legislature, whose will, as expressed by the law, is controllable only by the people. If the people consider a law impolitic or unwise, and desire its repeal, they must address themselves to their legislators. But so long as the law remains on the statute book, it is binding upon Courts and people; and it is only with its constitutionality that Courts have to deal.

The law under consideration is principally called in question because it is claimed to conflict with Section 4 Article i of the Constitution of the State, which declares that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this State. But, as I read it, the law simply expresses the intention of the Legislature to establish a day of rest from secular employments. It is not so expressed in exact terms, but that is unquestionably the reason and purpose of the law; for it regulates the observance of Sunday by

prohibiting acts to be done on that day, which, if done, would be contrary to public morals and decorum, and render nugatory the law which establishes the day as a secular institution.

Of the power of the State to establish such an institution, I think there can be no reasonable doubt. Under our free form of government, the Legislature of the State has authority, in the exercise of the police power of the State, to establish for the intercourse of the several members of the body politic with each other, those rules of good conduct and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as reasonably consistent with a correspondent enjoyment by others. "This," says Mr. Justice Cooley, "is a most comprehensive branch of sovereignty, extending, as it does, to every person, every public and private right, everything in the nature of property, every relation in the State, in society and in private life:" and for the regulation of the internal police of the State, it is a power which belongs exclusively to the State. (Cooley on Cons. Lim. 227.)

Of course a law passed in the exercise of this sovereign power must be in harmony with the will of the people, as expressed in their organic law. The one must explain or confirm the other. The enforceability of the statute law must be tested and verified by the Constitution. And the question arises, how or in what respect does the law under consideration, which as we have seen, simply establishes a day of rest as an institute of the State, interfere with the free exercise and enjoyment of the religious profession and worship of any of the religious groups within the limits of the State, or of any of their individual members? Answer is made that the day set apart by the State for that purpose is Sunday or the Christian Sabbath, and that the observance of the day is made compulsory upon those who, under the authority of non-Christian Churches to which they belong, have to regard and keep sacred some other day than the Christian Sabbath, and therefore the law discriminates against them and in favor of Christians.

The argument seems to interpose the authority of churches against the power of the State—to exalt the inferior at the expense of the superior—the protected against its protector. But as between the State and religious bodies within the

limits of the State, the power of the State, under her organic law, is supreme.

By virtue of her sovereignty, the State has guaranteed freedom of religious opinion and worship to all religious bodies and people within her boundaries. But in granting those guarantees, she did not relinquish to religious bodies, nor divest herself of the power to establish a day of rest as a municipal institution for the people of the State. That power was reserved to be exercised over all the members of the body politic, without reference to whether they are Christians or Hebrews, followers of Confucius, of Guatama Buddha, of Mohamet or of Joe Smith ; or those who say in their hearts, "There is no God." Subject to that reservation, every citizen of the State is left free to his intellectual convictions and emotional fervors upon subjects of the *unknown* and *unknowable*. All are equal in the laws, in positions under the law, and in the administration of the Government. No legal distinction or discrimination can be made between them. But, thus protected, all are subject to the municipal institutions established by the State. And in establishing a day of rest as one of those institutions, the State has the right to determine what day ought to be set apart for that purpose, and how it ought to be observed by the people. She is not bound by any constitutional obligations to the selection of any particular day. Any one day in seven, or in six, or in eight—either the first or the seventh day of the week, or any other day, may be appropriated by her for that purpose. Sunday is only a designation for the first day of the week ; and to deny the power of the State to set apart that day, or any other day, is to deny the power to set apart a day of rest as a municipal institution at all. But that is not contended. It is conceded that the power exists and is exerciseable, subject to the guarantees of the Constitution. It is only claimed that these guarantees have been invaded, because the legislation in question infringes upon the religious liberties of the Hebrews and the Seventh Day Adventists, and, it may be, other religious citizens, by making it compulsory upon them to observe a day which they are, by the authority of their churches and their consciences, forbidden to keep holy. In such views, men simply deceive themselves by words ; for the State has not set

apart Sunday for a day of rest as a *religious* institution ; nor does she impose observance of the day upon churches or on church members, nor are religious commemorations or ceremonies prescribed or enforced. The duty of observing the day is imposed on the people of the State as members of the body politic, without reference to the religious faith and worship of any.

And as a day of rest, Sunday is not set apart as a *holy* day, but it is set apart as a legal holiday. As such the State has from the beginning appropriated it. On that day the business of her Courts and public offices is suspended ; presentment of commercial paper, and services of legal notices and civil process, is disallowed ; and in the computation of time for the performance of an act required by contract or law to be performed on a day which may happen to fall on Sunday, the day is excluded ; and the people generally, without reference to faiths or creeds, have observed, and continue to observe it as such, unconscious that, as a municipal institution, it has ever invaded or violated any of their constitutional or religious rights.

But it is urged that the heading of the chapter of the Penal Code in which the law is contained demonstrates the unconstitutionality of the law, because the acts which are prohibited on Sunday are made offenses against religion, conscience and morals, and therefore the law discriminates in favor of the Christian religion against other religions.

The office of the heading of the chapter is simply to control, limit, and apply the provisions of the chapter. Ten sections in all comprise those provisions ; two or three of them relate to the observance of Sunday or the Christian Sabbath (§§ 299, 300, 301), one of them to offenses against all religions (§ 302), and mostly all of them to offenses against good morals.

Considered as part of the chapter, I think there is no difficulty in ascertaining from the heading to what subjects the words of the heading relate, or in determining what the Legislature intended to prohibit as offenses against religion, conscience and public morals. Keeping in mind that the Code establishes the law of the State respecting all subjects ; and that its provisions are to be liberally construed with a view

to effect the objects of the law and to promote justice, where is the violation of any provision of the Constitution in prohibiting, on a day established by the State as a day of rest, such acts of licentiousness, profanity and disorder as are calculated to shock the moral sense of the community, or to disturb the rest established by law? It can only be, because the objector contracts such acts on that day to offenses against the Christian religion, and not against *his* religion; and that the moral sense which may be shocked by acts done on that day is in a moral sense only from the Christian's standpoint.

But the acts are not prohibited as offenses against any religion—Christian or Pagan. It is true that the day on which they are prohibited is coincident with the Christian Sabbath; but as already shown, the State had the right to select that day or any other for a day of rest. And it may be conceded that the acts prohibited by the law on that day, are only prohibited because they are such as would be offensive to public morals, according to the standard of Christianity. But if the prohibition does not interfere with any man's liberty of conscience, it is no valid objection to the law, by which the Legislature has compelled the observance of the day, because it prohibits acts to be done which are deemed immoral according to the standard of one religion or another. Doubtless, the law was passed under the influence of Christianity. Assuming that it was, that in itself, should be no objection to the law by the Jew or the Gentile; for the religion of Jesus is closely connected with the religion of Moses—the one is but a development of the other, and pervades the ordinary political and moral life of the people; and the legislator, in the course and character of legislation, can recognize no other standard of moral ideas. As the prevailing religious opinion of the people public morals are largely dependent upon it.

The mere fact, then, that the mode of observing the day is enforced by the prohibition of acts which are offensive to public morals according to the standard of Christianity, affords no ground for constitutional objection to the law itself, if it does not violate the religious rights of others who do not call themselves Christians. But neither the religious profession and worship of the Jews, or of the Seventh Day

Adventists, or of any other religious association, are abridged by the law.

"There is," said Mr. Justice O'Neill, of the Supreme Court of South Carolina, in the year 1848, in language applicable alike to all religions as to the religion of the Hebrews, of which he was speaking, "no violation of the Hebrew's religion, in requiring him to cease from labor on another day than his Sabbath, *if he be left free to observe the latter according to his religion.* It is the seventh day which is to him a holy day, made so by his religion, and to be observed at his peril. All other days are to him indifferent. Hence he can find no abridgment of his religion in being compelled to abstain from public trade, employment, or business, on one of them. If the Legislature, or the city of Charleston, were to declare that all shops within the State or city should be closed, and that no one should sell or offer to sell any goods, wares, or merchandise, on the Fourth of July or Eighth of January in each year, would any one believe such a law was unconstitutional? It could not be pretended that religion had anything to do with that. What has religion to do with a similar regulation for Sunday? It is, in a political and social point of view, a mere day of rest; its observance, as such, is a mere question of expediency. But, says the argument on the other side, we should not object to it if it did not give a Christian a preference over an Israelite. Where is such a provision? There is none such in the law. It is general, operating upon all. The Constitution, in the respect under consideration, considers all the people of South Carolina, on whom the Government is to operate, as citizens merely. It does not divide them into Christians and Hebrews or any other classification. If the law be according to that, there is no objection. It is true, the Israelite must cease from business on Sunday; so do all others. His religion makes him also observe Saturday. That is not the effect of our law; it is the result of his religion, and, to enjoy its cherished benefits, living in a community who have appointed a different day of rest, he must give to its law obedience, so far as it demands cessation from public employment."

It is not necessary to dwell upon the objections that the law in question is special legislation, and does not operate

alike upon all classes. These objections have been satisfactorily disposed of by the learned opinion of the Chief Justice of this Court in *Ex parte Burke*, (59 Cal. 6). I think the petitioner should be remanded.

MCKINSTRY, J., dissenting:

I dissent. Sections 300 and 301 of the Penal Code are:

"Sec. 300. Every person who keeps open on Sunday any store, workshop, bar, saloon, banking house, or other place of business, for the purpose of transacting business therein, is punishable by fine not less than five nor more than fifty dollars.

"Sec. 301. The provisions of the preceding section do not apply to persons, who, on Sunday, keep open hotels, boarding houses, barber shops, baths, markets, restaurants, taverns, livery stables, or retail drug stores, for the legitimate business of each, or such manufacturing establishments as are usually kept in continued operation; provided, that the provisions of the preceding section shall apply to persons keeping open barber shops, bath houses, and hair dressing saloons after 12 M., on Sunday."

The important question presented by the petition herein is—Do the sections quoted conflict with the fourth section of Article i of the Constitution of the State? The section of the Constitution reads as follows:

"The free exercise of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this State; and no person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State."

It has sometimes been suggested that laws like that we are considering may be defended on the same ground as are laws against blasphemy and other profanity. But until it can be shown that any man in his sound mind pretends to believe that indulgence in wanton and public blasphemy, or other profanity, is necessary to the "free exercise and enjoyment" of his religious profession or worship, he can not be heard to

claim the protection of the provision of the Constitution. The difference between the two classes of laws is rendered palpable by their comparison." "Sunday laws," have never been upheld in California on any other ground than that they simply provided for a period of rest.

In *Ex parte Andrews* (18 Cal. 678, 685), the conclusion to which the Court arrived was distinctly based upon the reasoning of the dissenting opinion of Mr. Justice Field, in *Ex parte Newman* (9 Cal. 502, 518). In the dissenting opinion referred to the Act of 1858 "for the better observance of the Sabbath" is declared not to be violative of the provision of the Constitution which allowed the free exercise of religion, because it simply required a periodical cessation from labor "tending to the preservation of health and the promotion of good morals." The cases cited by Mr. Justice Field all turn upon the same point. This will more clearly appear from an examination of the leading cases—*Spect v. Commonwealth*, 8 Barr. 312, and *City Council v. Benjamin*, 2 Strob. 529. In the first of these cases it was said that the statute of Pennsylvania then under consideration, only selected and set apart the first day of the week, or Sunday, as a day of *legalized rest*, and enforced the observance thereof by legal sanctions, and was, essentially, but a civil regulation. And in the South Carolina case, that religion had "nothing to do with" a prohibition of business on Sunday; that, in a political and social point of view, the prohibitory Act merely made the first day of the week a day of *rest*.

In view of the provision of the former and present Constitution prohibiting legislation which may discriminate against any form of religious profession or worship—the liberty of conscience intended to be secured by which is the more clearly defined by the clause that it shall not be construed to prohibit the prevention of licentious practices, or such as are inconsistent with the peace and safety of the State—I have never believed that a law which punishes as a crime the doing of any business, otherwise lawful, on Sunday, could be defended upon the ground on which such a law was attempted to be upheld in *Ex parte Andrews*.

Many years ago, in another place, I had occasion to say: "I confess I approach the question presented in this case with

a feeling of repugnance to such legislation as that upon which this prosecution is founded." (The Act of 1858, "to prohibit barbarous and noisy amusements on the Christian Sabbath.") "Indeed, if the constitutionality of 'Sunday laws' were a new question in this State, I should hesitate to sustain them. Strictly speaking, no form of religion is *tolerated* in California. By the terms of the Constitution (of 1849), 'the free exercise and enjoyment of religious profession and worship, *without discrimination or preference*, shall forever be allowed.' It is the absolute right, therefore, of every citizen to worship God according to the dictates of his own conscience, and to keep holy such days as his own religion may sanctify; and it would be difficult to convince an 'orthodox' Jew (for example), who has abstained from secular employment on Saturday, that a law which compels him to refrain from like employment on Sunday gives no preference to other forms of religion. Certainly all argument based upon the supposed physical benefits derived from a stated day of rest would have little application and furnish little ground for enforcing a 'Sunday law' upon one who has taken *his* rest on the preceding day." (*People v. Fritch*, in the County Court of San Francisco.)

It is gratifying to know, that, in his exhaustive work upon Constitutional Limitations, subsequently published, Mr. Justice Cooley did not hesitate to avow his conviction that a law which prohibits ordinary employments upon the Sunday cannot be sustained as a sanitary regulation, based upon the demonstration of experience that one day's rest in seven is needful for the recuperation of the exhausted energies of body and mind. The learned author says: "The Jew" (and we may add the Seventh Day Baptist, of whom we take notice there is a considerable number in California), "who is forced to observe the first day of the week, when his conscience requires of him the observance of the seventh also, may plausibly urge that the law discriminates against his religion, and, by forcing him to keep a second Sabbath in each week, unjustly though by indirection, punishes him for his belief. * * * It appears to us that, if the benefit to the individual is alone to be considered, the argument against the law which he may

make, who has already observed the seventh day of the week, is *unanswerable*." (Cons. Lim. 476-7, First Ed.)

Nor can the doctrine *stare decisis* be invoked to prevent us from inquiring into the constitutionality of the sections of the Penal Code. If, in *Ex parte Andrews* the act of 1858 was decided to be valid, in *Ex parte Newman* (9 Cal. 502), the same act was declared to be in conflict with the fourth section of the first Article of the former Constitution. In holding the sections of the Penal Code to be obnoxious to constitutional objection, we but return to the rule which, for more than three years, was the established rule in California. But if the case *Ex parte Andrews* stood alone—"No such rule ever existed as that a Court should be absolutely bound by a previous decision. And it would be especially dangerous to apply this inexorable standard to questions decisive of the constitutional rights of the citizen." (*Houghton v. Austin*, 47 Cal. 666.) It was said in *Willis v. Owen*, 43 Texas, 48: "When the decisions relate not to matters of title or contract, but abstractly to the structure of the Government, the limits of executive and legislative power etc. the doctrine of *stare decisis* does not apply." The last statement is certainly correct, unless it can be shown that property interests have grown up under a certain construction of the organic law of which there is no pretense with reference to the provision of the Constitution whose interpretation is to be considered in the present case.

But a decision holding the sections of the Penal Code to be repugnant to the constitutional inhibition of legislation of a partial character with respect to religious profession and practice, does not necessarily require a reversal of *Ex parte Andrews*. The Act of 1858, there considered, was in the usual form. It prohibited business, except of certain sorts, on "the Christian Sabbath or Sunday," and was entitled: "An act for the better observance of the Sabbath." I cannot admit to be satisfactory the reasoning by which the result was reached, but the result was reached, that the words "Christian Sabbath" meant merely a period of time—the first day of the week.

In the view of the Court the words were entirely without ambiguity, so that there was no necessity to refer, and would

have been no propriety in referring to the title of the Act. Thus construing the body of the Act, it was said that its only scope and purpose was to establish, as a civil regulation, a day of rest from secular pursuits. In the dissenting opinion, in *Ex parte Newman*, much stress is placed upon the circumstance that there is nothing in the enacting clause of the Act of 1858, to indicate that it was in the mind of the legislators to enforce any religious observance. In that opinion the words are italicised—"It does not even allude to the subject of religious profession or worship in any of its provisions." If the Act of 1858 had contained a distinct statement that it was intended thereby to punish any person who should be guilty of the irreligious act of performing labor upon the "Christian Sabbath," the learned author of the dissenting opinion might have arrived at a different conclusion touching its validity. Construed according to established principles, such a declaration in effect is contained in Sections 300 and 301 of the Penal Code.

The Penal Code is divided into parts, titles, chapters and sections; and at the head of each chapter is a note indicating generally the subjects to which the chapter is devoted. Sections 300 and 301 are found in chapter seven of title nine, and the head note to this chapter is in these words: "Crimes against religion and conscience, and other offenses against good morals."

"While," as was said of the Practice Act in *Barnes v. Jones*, "while the rule is well settled that the *title* of an act will not control the language in the body of the statute, but may be referred to as tending to explain the intention (only) when the language is doubtful, we are of opinion that these head notes are entitled to more consideration than the title to the entire Act." (51 Cal. 303.)

"In this form of enactment, such statements" (at the head of the respective chapters) "are a part of the law itself, and not in any wise extrinsic to the enacting clause. To reject them, or to refuse to give effect to them, according to their fair and ordinary import and understanding, would be to make the law, not to administer it." (*The People v. Molineux*, 53 Barb. Sup. Ct. R. 15; see, also, *Williams v. People*, 45 Id. 201.) In *People v. Molineux*, on appeal, (40 N. Y. 119), it was

said: "The whole of the first part of the Revised Statutes, including the definitions given in heads of the chapters and the title to the subject-matter following, was a single statute. Those headings are not *titles* of the acts, but are parts of the statute, limiting and defining their effect."

Thus considering the note in the head of the chapter as a portion of the chapter, it is to be pointed and applied to the several sections of the chapter *appropriately*. The sections in the chapter which prohibit certain acts upon the "Christian Sabbath," or Sunday, are intended to declare that these acts are not only violations of a sanitary regulation, but a desecration of a religious holiday, and, consequently, "crimes against religion." Other sections evidently are intended to be covered by the phrase "other offenses against morality."

In the sections of the Penal Code it is declared, therefore, that any person who shall neglect or refuse to observe, to the extent of a cessation from ordinary employments at least, a religious festival, recognized and celebrated by Christians alone, and not by all sects of Christians, is guilty of a crime against religion, to be punished as provided. As to the Jew, it is not a crime against *his* religion to labor on the first day of the week, and the plain purpose of the provision of the Constitution is to prohibit a legislative confusion which shall substitute the religious profession or worship of a class or sect for *religion*. Under penalty citizens are compelled by the sections of the Code, so to conduct themselves as is required not by their own, but by the religion of others.

The statute (reading the note which precedes the chapter in connection with the several sections comprised within it) declares it to be a *crime against religion* for any person not to refrain from certain secular employments upon Sunday; a word for which the words "Christian Sabbath" are used as an equivalent in the same chapter. To enforce such a law is in effect to punish for a disregard of a religious institution or ordinance; to enforce it against one whose religion attributes no sanctity to the institution or ordinance, but requires of him to keep sacred, as of binding obligation, another day in the week, is to discriminate against the free exercise of his religious profession and worship.

ROSS, J.:

I dissent for the reason last given in the opinion of Mr. Justice McKinstry, that is to say, for the reason that the statute involved in this proceeding, fairly construed, makes the Act in question a crime against religion. It is a mistake to say that the present statute is like that involved in *Ex parte Andrews*, 18 Cal. 678, and in the other cases cited. The distinction which is an important one, has been clearly pointed out by Mr. Justice McKinstry and need not be repeated by me.

SHARPSTEIN, J.:

I dissent. In *Ex parte Andrews*, 18 Cal. 678, the Court endeavored to avoid the objection that "the Sunday law" then in force was repugnant to that clause of the Constitution which declares that "The free exercise and enjoyment of religious worship, without discrimination or preference, shall forever be guaranteed in this State," by holding that it was within the power of the Legislature to make it a misdemeanor for any one to keep his place of business open for the transaction of business on any day of the week, and that "the power of selection being in the Legislature, there is no valid reason why Sunday should not be designated as well as any other day."

I cannot assent to the proposition that this law can be regarded as it would be if the day designated in it had not been the Sabbath of any religious sect, nor do I think that the Legislature would have the constitutional power to make it a misdemeanor for a person to keep his place of business open on any day other than the Sabbath of some religious sect, for the transaction of business which it would be neither illegal, immoral nor improper to transact on any other day than the one so designated.

First: Can the Legislature, in view of the provision of the Constitution above quoted, ignore the existence of religious sects in this State to the extent that the Court in *Ex parte Andrews* holds that it may? If so, what force and effect is to be given to the words "without discrimination or preference?" There are in this State religious sects whose tenets

require them to suspend the transaction of business on the first day of each week, and other sects whose tenets require them to do so on the seventh day of each week. And it is held in *Ex parte Andrews* that the Legislature has the power to require a suspension of business on one day of each week, which it may designate for that purpose, because the physical and moral well-being of society is thereby promoted.

Now it is apparent that by selecting the first day of the week as a day of rest, the Legislature has discriminated in favor of those whose religious tenets require the observance of that day, and against those whose religious tenets require the observance of the seventh day. A member of the latter sect is required to observe two days, while a member of the former is only required to observe one day of each week. If the seventh day had been selected, the discrimination against those whose religion constrains them to observe the first day would have been equally plain. And if any other than the first or seventh had been selected, there would have been a discrimination against all sects whose religion exacts the observance of either the first or seventh day of each week. The law does not require that any one should live up to the requirements of his religion in this respect. But the Constitution does guarantee to every one the free exercise and enjoyment of religious worship without discrimination or preference, and it is plainly the duty of the Legislature to so frame its enactments that they shall not bear more heavily upon one sect than upon another, or upon those who profess religion than upon those who do not. As I read the constitutional guarantee, it not only requires that the Legislature shall recognize the existence of religious sects, but that it shall protect them in the exercise and enjoyment of religious worship without discrimination or preference.

Now, if it be necessary that people should rest one day in seven, and unnecessary that they should rest two days in seven, and wholly immaterial on what day they rest, it was the duty of the Legislature to take notice of the fact that many people are constrained by their religion to rest on the seventh day of each week, and to have excepted them from the operation of "the Sunday law." I do not think that there would have been any more impropriety in excepting

them from its operation than there was in excepting livery stable keepers from its operation. It was only by excepting from the operation of the law those whose religious convictions constrained them to observe some other day than the one designated in the Act, that it could be made to bear equally upon all classes of people. And a law which does not bear equally upon all classes of people is not without discrimination or preference. It is impossible for a person whose religion constrains him to observe the seventh day of each week, to live up to the requirements of his religion and at the same time obey this law, without sacrificing one day more each week than the person whose religion constrains him to observe the first day of the week, or the one who is not constrained by religion to observe any day of the week. It does seem to me that this constitutes discrimination or preference, and as I understand the Constitution the Legislature has no power to pass such a law. It is no answer to this objection to say that the law ignores religion altogether, because the Legislature has no right under the Constitution to ignore religion when passing laws which must seriously affect those who profess it in some one of its various forms. If it is only necessary that the people of this State should rest one day in seven, and wholly immaterial on what day of the week they rest, those whose religion requires them to rest on a day other than that designated in the Sunday law, should have been excepted from its operation in order to avoid discrimination or preference which the Constitution forbids.

Second: If this law is not inconsistent with the provision of the Constitution to which I have referred, is it consistent with all other provisions of that instrument?

In this State, at least, the validity of this law has been sustained on the sole ground that it is within the power of the Legislature to make it a misdemeanor for a person to keep his place of business open for the transaction of business on any day which it may designate, and that the fact of Sunday having been designated is an immaterial circumstance, in no way affecting the question of the constitutionality of the law.

The principle is doubtless well settled, "that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability *that his use of it* shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." (*Commonwealth v. Alger*, 7 Cush. 53, *per Shaw*, C. J.) And it is unquestionably within the power of the Legislature to impose such restraints upon the free use of property by its owner as may be necessary to prevent such use of it from being injurious to the rights of others or of the community. Among the rights which the Constitution declares to be inalienable are those of "securing, possessing, and protecting property," and it further declares that no person shall be deprived of "property without due process of law." A person who acquires property, acquires the right to use it, subject to "the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." "The term (property), although frequently applied to the thing itself, in strictness means only the rights of the owner in relation to it." (*Per Selden, J., in Wynehamer v. The People*, 13 N. Y. 378.) And one of the rights of an owner of property in relation to it is the right to use it. And any Act of the Legislature which interferes with the right of a person to use his own property within the limit above defined, deprives such person of one of his constitutional rights. And unless it can be shown that a person who keeps his place of business open for the transaction of business on every day of the week, thereby transgresses that limit, any law making it a misdemeanor for him to so keep it open on every day, would clearly be unconstitutional. I am assuming now that this law must be regarded precisely as it would be if the day designated had not been the Sabbath of any religious sect. If, then, it can not be seen or shown that a person by keeping his place of business open for the transaction of business on every day of the week, would cause any more injury to the rights of any other person, or those of the community, than he would by so keeping it open on six days every week, it seems to me that the Legislature could not constitutionally make it a mis-

demeanor for a person to keep his place of business so open on any day of the week.

"If the particular work or trade be not in its nature a nuisance, as prejudicial to the health or comfort of the public, it does not become so by being performed or carried on on one day, more than another." *Per* Ruffin, C. J., in *State v. Williams*, 4 Iredell, 400). In the same opinion the following passage occurs: "The truth is, that it (work on Sunday) offends us not so much because it disturbs us in practicing for ourselves the religious duties, or enjoying the salutary repose or recreation, of that day as that, it is in itself a breach of God's law, and in violation of the party's own religious duty." He admits, however, that, "There are many offenses against God, which are not offenses against the State." And he says: "Although it may be true, that the Christian religion is a part of the common law, it is not so in the sense that an act contrary to the precepts of our Savior or Christian morals, is, necessarily, indictable. Those which were merely against God and religion were left to the correction of conscience, or the religious authorities of the State. Such, necessarily, must be the character of acts which are criminal only *in respect of the day on which they are done*, being a day set apart by the author of our religion for his peculiar service."

It is only in respect of the day on which they are done that the acts enumerated in the law under consideration are criminal. They may lawfully, and some of them must almost necessarily, be done on nearly all other days. Under our Constitution the Legislature has no power to enforce the observance of any day as a religious duty. The power of the Legislature to interfere with the use of property by its owner in proper cases can not be questioned. But when it does so interfere, and its power to do so is challenged by the owner, the duty of deciding whether such interference was reasonable or not devolves upon the Courts. If the Court is unable to discover any reasonable ground for such interference, it must decide that it was unconstitutional. And the only ground upon which a person can be deprived of the ordinary and lawful use of his property one day in seven is that such deprivation is necessary in order to protect other persons, or the community, in the enjoyment of their equal rights. That,

however, is not the ground upon which it is claimed that the constitutionality of this law can be supported. But it is claimed that it can be supported on the ground "that one day's rest in seven is needful to recuperate the exhausted energies of body and mind."

In a government modeled after the Republic of Plato, that would doubtless constitute a sufficient ground for legislative interference. But if the government has the power to do that, why should it not assume all the functions which Plato assigned to it? In the language of Macaulay, "why should it not take away the child from the mother, select the nurse, regulate the school, overlook the play-ground, fix the hours of labor and recreation, prescribe what ballads shall be sung, what tunes shall be played, what books shall be read, what physic shall be swallowed—why should it not choose our wives, limit our expenses, and stint us to a certain number of dishes, of glasses of wine, and of cups of tea?" Why should it not fix the hours of retiring at night and rising in the morning? Experience has demonstrated that a certain number of hours sleep in every twenty-four are needful to recuperate the exhausted energies of body and mind.

In deference to public opinion, the Legislature of this State enacted what is known as the "Eight-hour law." The ground upon which that law was demanded was that experience had demonstrated that whoever labored eight hours in twenty-four required the other sixteen for the recuperation of the exhausted energies of his body and mind. But the Legislature did not attempt by that law to prevent any one from laboring more than eight hours a day. It simply declared that "eight hours of labor constitute a day's work, unless it is otherwise expressly stipulated by the parties to a contract." Now, I do not think that it would be seriously claimed that the Legislature would have the power to make it a misdemeanor for any person to keep his place of business open for the transaction of business more than eight hours a day, because experience had demonstrated that the other sixteen were needful for the recuperation of the exhausted energies of his body and mind. And yet it cannot be denied that such a law would be within the principle invoked by those

who maintain that the Sunday Law in this State is constitutional.

When the construction put upon the "eight-hour" clause of the San Francisco street law was before the Supreme Court, Sanderson, J., said: "It seems to me that to provide that a man shall not labor more than eight hours *in each day*, notwithstanding his own necessities, or the necessities of those who are dependent upon him may render it absolutely necessary for him to do so, would be to go much further than any legislative body has yet gone in regulating the exercise of the natural right of every man to labor for the support of himself and family, or for the purpose of acquiring, possessing, and protecting property." (*Drew v. Smith*, 38 Cal. 325.) But it would be going no further than the Legislature has gone in making it a misdemeanor for a person to keep open his place of business more than six days in each week for the transaction of business. And it is quite evident that Mr. Justice Sanderson saw that he was laying down a principle to which "Sunday laws" were no less repugnant than "Eight-hour laws." For he immediately added: "That man shall not work on Sunday, seems to be considered by common consent to be a necessary and salutary rule, on the score of health, and, therefore, the Courts have held that Sunday laws are not an unreasonable interference with his natural right to labor and transact business; but who is prepared to say that a man shall not only not work on Sunday, but he shall not work more than eight hours in each of the other days of the week, or, in other words, that out of each one hundred and forty-four hours he shall not be allowed to work more than forty-eight hours, *under the pretense that to do so would injuriously affect and impair his general capacity for labor?*"

If it is simply a question of hygiene and the Legislature has the power to prescribe a regimen for the people of this State, every one should be prepared to say, what he evidently thought that no one was prepared to say. The circumstance that it seems to be considered by "common consent" a necessary and salutary rule "that man shall not work on Sunday" is not entitled to much weight in determining his constitutional right to do so. Something more than "common consent" is required before a man can be deprived of any of his

Constitutional rights. I do not doubt the constitutionality of the law which constitutes eight hours of labor a day's work, unless otherwise stipulated by the parties; nor do I doubt that it is within the power of the Legislature to constitute six days of labor a week's work, unless otherwise stipulated by the parties. But I think that it is beyond the power of the Legislature to make it a misdemeanor for a man to work more than eight hours a day, or more than six days a week, unless his doing so would injuriously affect the rights of others.

All the courts and law writers concur in basing the power of the Legislature to impose any restrictions or regulations upon the right of an owner to use his own property as he sees fit, upon the maxim, *sic utere tuo ut alienum non laedas*, which does not require that a man shall use his own property so as not to injure it or himself. And it has probably never been held, except in cases involving the validity of Sunday laws, that the Legislature could restrict or regulate the use of private property for any other purpose than that of preventing such use from becoming "injurious to the equal enjoyment of others having an equal right to the enjoyment of their property," or "injurious to the rights of the community."

Third: Is the constitutionality of this law an open question in this State? In *Ex parte Newman*, 9 Cal. 502, a similar Act of the Legislature was held to be unconstitutional. Afterwards another Act of the same character was passed, which in *Ex parte Andrews, supra*, was held to be constitutional. In *Ex parte Bird*, 19 Cal. 130, the Court, on the authority of *Ex parte Andrews*, held the same Act to be constitutional. From that time to the present, embracing a period of more than twenty years, no effort to enforce the observance of the law appears to have been made, and no one who has lived in the State during that period will claim that the law has been even generally complied with. Many have devoted the day to religious exercises, some to recreation, and others to labor, and all apparently ignorant of the existence of this law. It does not seem to me that under such circumstances it can fairly be claimed that the question of the constitutionality of this law in this State is no longer an open one. The decisions upon that question in this State are not

uniform, and those which affirm the constitutionality of the law are based mainly upon the ground that such laws have quite uniformly been held to be constitutional in other States. But that, in my opinion, is not of itself a sufficient reason for construing any provision of our own Constitution contrary to its obvious meaning.

[No. 7512.—In Bank.]

March 14, 1882.

S. E. ALDEN v. A. D. PRYAL, ET AL.

PROMISSORY NOTE—MORTGAGE—FAILURE OF CONSIDERATION—SALE OF LAND—FRAUD—MISTAKE IN QUANTITY.—In an action to foreclose a mortgage for the purchase money of land sold and conveyed to the mortgagor by the mortgagee, the defendant set up in his answer, and on the trial in effect offered to prove false and fraudulent misrepresentations as to the boundaries and quantity of land sold, a partial failure of title and an offer to rescind; but did not offer to prove eviction. *Held*, that the evidence was rightly excluded. (McKEE, dissenting).

MORTGAGE—ATTORNEY'S FEE—FORECLOSURE.—The mortgage foreclosed provided for "counsel fees and changes of attorneys, and counsel employed in such foreclosure suit not exceeding——." *Held*, counsel fees were properly allowed.

APPEAL from a judgment for the plaintiff and from an order denying a new trial in the Superior Court of Alameda County. CRANE, J.

The defendant was sworn as a witness, and upon the inquiry of the Court as to what facts were proposed to be proved by said witness, the attorneys for defendant offered to prove by said witness the following state of facts:

"Mr. Griffith. Well, Sir (to the Court), we propose to prove by Mr. Pryal and other witnesses, that Mr. Alden, at the time he conveyed us this land by certain metes and bounds, so many feet front, knew that he did not own that amount of land. We will prove further by Mr. Pryal that he furnished us with a map representing that he did own the land, although he knew at the time that he did not own it. That we had no means of ascertaining what the true boundary of the land was, excepting his representations and the map that he

furnished us. We expect to prove by Mr. Pryal that the piece of land as represented to him by Mr. Alden was suitable for the purposes he desired to purchase it for, and that it was worth the amount that is specified there, and we will prove by Mr. Pryal that soon after he had purchased it he was notified by the county that the road ran in some twenty feet upon the premises. The road was laid out, I think, as early as 1862, yet there seemed to have been some dispute in relation to where the line ran. The Board of Supervisors, since 1877, ordered a resurvey of the road by the County Surveyor. The resurvey was made, and ran where the original survey called for, taking off this twenty (20) feet. The resurvey was subsequent to the execution of the mortgage. That matter of the road was of record in the records of the Board of Supervisors, but then the obstructions in the road had never been removed. The fences had never been moved back, although the Board of Supervisors had declared the road opened. Now, we offer to prove by Mr. Pryal that the true lines were not such as designated and pointed out by Mr. Alden, and such as represented by this map; that at the time of the purchase there was a building standing on these premises, erected by Mr. Alden himself; that the building could not be placed upon the land that was left there without obstructing the public road, so that the premises are utterly worthless. And when we found that the lines were given to us incorrectly, and that the property was not suitable for the purposes for which he sold it to us, we offered to surrender to him all the right and title we had, to deed to him all the right, title and interest we had acquired by virtue of this deed, on his surrendering to us the note and cancellation of the mortgage. We expect to show further that this very land was dedicated for road purposes, which land Mr. Alden afterwards sold to Mr. Pryal. We propose to show further that Mr. Alden was one of the petitioners for opening this road, and that he was before the Board of Supervisors, and the road was declared opened; that it was dedicated to road purposes, a portion of this land that he afterwards sold to Pryal. Now, after taking out that portion of the land that he dedicated for the road, the balance of the land is of no value whatever, and is not large enough

for the very building Mr. Alden sold to us, and which he had erected himself on the premises."

To all and every portion of which testimony so proposed and offered, counsel for plaintiff then and there objected, on the grounds that the same was incompetent, irrelevant, and immaterial.

The Court. "I understand you to say your client, Mr. Pryal, had possession of this land, with the exception of this land taken for the road. He has it in possession yet. Is that the fact, Mr. Griffith?"

Mr. Griffith. "No; we are not in possession of the whole."

The Court. "Is Mr. Pryal in possession of the land described in that deed?"

Mr. Griffith. "Not the whole of it, sir. In consequence of the proceedings for a road he has been compelled to pull down some buildings he had erected there, and been compelled to remove his business off the property entirely."

The Court. "What portion of it is he in possession of now; or was he when this suit was commenced?"

Mr. Griffith. "We do not claim to be in possession of any. We offer to deed back to him all the right, title and interest we have in the property. Mr. Pryal informs me that after these proceedings were commenced he was compelled to remove his buildings and his business away from that place. While the building is still standing there—has not been abolished or removed by the county—we do not claim the possession at all, because we are ready to deed back to him; and we are not actually, physically, in possession of any of it; only in possession constructively by purchase from Mr. Alden. We went into possession under the deed, and we held the possession until we discovered that he did not own all the land; and since we have discovered that, we have removed our buildings and business from the premises. Mr. Pryal is not actually in possession there now. The county has not abolished that house yet."

A. H. Griffith and J. C. Martin, for Appellant:

The Court erred in excluding the evidence of the defendant of a total failure of consideration for the note and mortgage. The evidence offered was within the issue, viz: total failure

of consideration. There is no doubt that a total failure of consideration may be pleaded in bar of an action upon a promissory note, and evidence tending to prove such plea is always admissible upon the trial. (*Rees v. Gordon*, 19 Cal. 149, *Warner v. Daniels*, 1 Woodb & M. 110; *Hardeman v. Benge*, 10 Yerg. 202; *Bingham v. Bingham*, 1 Ves. 126; *Sedgwick v. Sedgwick*, 58 Cal. 214 215.)

And it is not necessary that the defendant should be evicted before he can avail himself of this defence, because the plaintiff, Alden, is not barred by adverse possession. (*Freemster v. May*, 13 Smed. & M. 275; id. 532, 534.)

The evidence offered was admissible and within the issue, because the answer alleges the defendant was induced to make the purchase through the fraudulent misrepresentation of the plaintiff, and was a full and complete defense to the plaintiff's action. (*Alvarez v. Brannan*, 7 Cal. 506; *Gifford v. Carroll*, 29 id. 592; *Collins v. Townsend*, 7 P. C. L. J. p. 178; *Perley v. Balch*, 23 Pick. 285; *Hagard v. Quinn*, 18 Pick. 95; 2 Kent's Com. 475, 476; Sug. on Ven., vol. 1, p. 435, § 10; Civil Code of California, § 1572).

The evidence offered by the defendant, and ruled out by the Court as irrelevant, was to prove a concurrence of fraudulent intent and fraudulent representations on the part of the plaintiff, Alden, and that the representations were false in fact and were made fraudulently. The evidence of these facts proving the same, the defendant's defense fell within the purview of Sec. 1572, C. C., and was a complete defense to the plaintiff's action.

The Court erred in rendering judgment against the defendant for one hundred and twenty-five dollars for plaintiff's attorney's fees for foreclosure of mortgage—neither the mortgage nor note provided for counsel fees. The plaintiff is not entitled to counsel fees. (*Sichel v. Carrello*, 42 Cal. 308.)

J. E. McElrath, for Respondent:

At the date of the purchase, the defendant entered into possession of the premises, and has never been evicted therefrom. He now seeks to avoid paying the note, on the grounds: 1. Partial failure of consideration. 2. Fraud, consisting of false representations as to the quantity. 3. That the appellant

offered to rescind the contract. The judgment should be affirmed, notwithstanding each of the grounds might be true. *The first ground is untenable*, because a partial failure of consideration cannot be pleaded in bar of an action upon a note for the purchase price of land. (*Reese v. Gordon*, 10 Cal. 147.) Especially is this so where there has been no eviction. (*Jackson v. Norton*, 5 Cal. 264; *Peabody v. Phelps*, 9 id. 226; 1 Johns Ch. 213; 2 Sandf. Ch. 344; 2 Kent's Com. 473; 5 Johns Ch. 29, 79; 5 Paige, 300; 2 Edw. Ch. 37; 3 id. 124; 25 Wend. 107; 26 id. 109.)

The second ground is untenable, because fraud cannot be predicated on false representations as to title. The party must look to the records of the county. (*Peabody v. Phelps*, 9 Cal. 226; *Wright v. Carrillo*, 22 id. 596.)

The third ground is untenable. The offer to rescind was not in time. (*Barfield v. Price*, 40 id. 535.) And besides, there is no allegation of outstanding paramount title. (*Riddle v. Blake*, 4 id. 264.) And no offer to account for the rents and profits. (*Walker v. Sedgwick*, 8 id. 398.)

MYRICK, J.:

This is an action to foreclose a mortgage. The premises as described in the complaint consist of a triangular piece of land at the junction of Telegraph (University) avenue, Oakland, with the Lafayette road, fronting ninety-six and sixty one-hundredths feet on the avenue, and two hundred and twenty-six and sixty one-hundredths feet on the road. The answer of the defendant Pryal alleged that the mortgage was given to secure the payment of the purchase money; that plaintiff falsely and fraudulently misrepresented the boundaries and quantity of the land, in that he represented he was selling and had a right to sell a frontage on the avenue of ninety-six and sixty one-hundredths feet, when in fact he did not own such frontage or any greater frontage than fifty-six and sixty one-hundredths; that by reason of the shape of the piece of land, the taking off twenty feet front on the avenue, running back, the land became of no value; and the defendant averred that the consideration for the note had entirely failed.

The defendant offered and read in evidence the deed, which

is a grant, bargain and sale deed of the ordinary form, and contains no express covenants. The defendant then offered to prove that in 1862 the Board of Supervisors of Alameda county laid out the avenue as a public highway, which included the twenty-foot strip, but that the inclosures of plaintiff were not removed; that plaintiff represented to defendant that he owned and was selling according to the deed and inclosures; that after the making of the deed and mortgage there was a dispute as to where the true lines ran, and the Board of Supervisors ordered a re-survey, which was made and ran where the original survey was made, taking off the twenty feet; the proceedings in regard to the road were of record in the records of the Board of Supervisors, but the obstructions had not been removed; that at the time of the purchase plaintiff furnished to defendant a map which designated the premises according to the deed; and that when defendant ascertained that the strip of twenty feet was taken off, he offered to re-deed on the note and mortgage being surrendered. The Court below sustained plaintiff's objection to the testimony, and this ruling is alleged as error.

There are three answers to the defendant's proposition, viz: 1. The records of the Board of Supervisors were open to the inspection of the defendant, and he could have easily ascertained where the lines of the road were, and whether the road included any portion of the described land. 2. The plaintiff, if he were the owner of it, had the right to sell, and the defendant to buy, the fee of the twenty-foot strip, subject to the easement of the highway. There could not, therefore, have been a failure of consideration, either as to that or as to the balance of the land. Each was of some value. 3. There was no offer to prove an eviction.

Another point is made. The mortgage contained the clause "Counsel fees and charges of attorneys and counsel employed in such foreclosure suit not exceeding——." It is claimed that this clause does not provide for counsel fees, and that the Court erred in awarding the same. We think the correctness of the action of the Court is apparent.

Judgment and order affirmed.

Ross, J., concurred.

SHARPSTEIN, J., concurring:

I concur in the affirmance of the judgment on the ground that the facts which the defendant offered to prove would not constitute a defense to the action. He did not offer to prove either an actual or constructive eviction. The laying out of a highway through the premises did not amount to an eviction from any portion of the land. If all the proceedings of the Board of Supervisors had been valid and such as to vest in the public a paramount title, it might have amounted to an eviction. But there was no offer to prove that they were valid. Until that is shown there is no sufficient ground upon which to base a defense of a failure of consideration in whole or in part.

THORNTON, J. :

In my judgment there was no error committed by the Court below as to counsel fees. On the other point, I agree with Sharpstein, J., and that the judgment and order should be affirmed.

McKEE, J., dissenting:

I dissent. In an action to foreclose a purchase money mortgage, the mortgagor is entitled to set up as a defense, and to prove, fraud or misrepresentation in the sale and conveyance of the mortgage premises, without first averring and showing an *eviction*.

Unquestionably, it is true, as a general rule, that a mortgagor, in such a case, will not be allowed to interpose as a defense against foreclosure, want of title, or defect of title in the mortgagee. The rule of *caveat emptor* binds the mortgagor as vendee of the mortgage premises to see to the title which he acquires by his purchase, or to protect himself by covenants in his deed. Where his contract of purchase has been executed by a conveyance of the land, he must rely upon the covenants in his deed in case of eviction or loss. He can not, in an action to foreclose the mortgage given by him to secure payment of the purchase money, attack his grantor's title, or show a defect in it, unless he has been evicted by paramount title. That is the general rule, but there are exceptions

to it as well defined and as firmly established, as the rule itself. Those exceptions are in cases of mistake, fraud, or misrepresentation. In such cases it is not necessary to show eviction. (*Booth v. Ryan*, 31 Wis. 45; *Grant v. Tallman*, 20 N. Y. 191; *Robards v. Cooper*, 16 Ark. 288; *Conwell v. Clifford*, 45 Ind. 392.) The party is relievable in equity.

"It would," says Chancellor Kent, in *Gillespie v. Moon*, (2 John's Ch. 596; S. C., 7 Am. Dec. 559), "be a great defect in what Lord Eldon terms 'the moral jurisdiction of the Court,' if there was no relief for such a case. * * * I have looked into most, if not all, of the cases on this branch of equity jurisdiction, and it appears to me to be established, *and on great and essential grounds of justice, that relief can be had against any deed or contract in writing founded in mistake or fraud.*"

The general rule and its exceptions are thus stated by the Supreme Court of Ohio. (*Hill v. Butler*, 6 Ohio St. 217.) "In general, where the title fails, in whole or in part, a Court will decree a return of the purchase money, even after the purchase money has been paid, and a delivery of the deed containing covenants of warranty, provided there had been a fraudulent misrepresentation as to the title. (*Edwards v. McLeay*, Cooper's Eq. 308; *Fenton v. Browne*, 14 Ves. 144.) *But if there be no ingredient of fraud*, and the purchaser is not evicted, or something equivalent to an eviction has not transpired, the insufficiency of the title is no ground for relief against a security given for the purchase money, or for rescinding the purchase and claiming restitution of the money. The party is remitted to his remedies on his covenants to insure the title. (*Abbott v. Allen*, 2 Johns Ch. 519; S. C., 7 Am. Dec. 554; *Edwards v. Bodine*, 26 Wend. 109; *Barkhamstead v. Case*, 5 Conn. 528; S. C., 13 Am. Dec. 92; *Maner v. Washington*, 3 Strobb. Eq. 171."

I think, therefore, that the Court below erred in excluding the evidence offered by the defendant to prove the defense of misrepresentation and fraud set up in the answer, and that the judgment ought to be reversed.

[No. 8,160.—In Bank.]

March 14, 1882.

REAL ESTATE ASSOCIATES v. SUPERIOR COURT
OF THE CITY AND COUNTY OF SAN FRANCISCO.

APPOINTMENT OF RECEIVER IN INSOLVENCY PROCEEDINGS—EX PARTE ORDER
—POWER OF JUDGE AT CHAMBERS.—A receiver may be appointed in an
insolvency proceeding (as well as in ordinary cases) by the Judge at
Chambers upon an *ex parte* application.

APPLICATION for writ of *certiorari*.*Wm. H. Fifield and J. E. McElrath*, for Applicant.

The order appointing a receiver is absolutely void, because
made by the Judge at Chambers.

The Superior Court, although a Court of general jurisdiction, is nevertheless a Court of inferior and limited jurisdiction, when proceeding under the Insolvent Act of 1880, not according to the course of common law or chancery procedure. (*Galpin v. Page*, 18 Wall. 370, 671; *Cohen v. Barrett*, 5 Cal. 196; *Meyer v. Coleman*, 8 Id. 46; *Pulaski County v. Stuart*, 28 Gratt. Va. 872; *Morse v. Presley*, 5 Fost. (N. H.) 299.)

The result is, that the Superior Court must follow the provisions of the statute, and that the whole proceeding is *stricti juris*.

Turning to the Insolvent Act of 1880 (Stat. 1880, p. 316), we find an Act containing sixty-eight elaborate sections, in which, I believe, the word "Judge" is never used.

All the leading powers, without exception, are conferred upon the Court, and not upon the Judge.

This is the most convincing proof that the Legislature *ex industria* intended to confer those powers upon the Court, which, under the Constitution, may be in constant session, without Terms, and not upon the Judge out of Court. Where the same word is repeatedly used in a statute, the same uniform meaning will be attached to it. (*Est. of McCausland*, 52 Cal. 568.)

Again, it is claimed that the grant of power contained in

Section 63 is enlarged by the general laws. If this be so, then we ask by what particular section of the general laws? Counsel refer us to Section 564, C. C. Pr. But we refer him in turn to Sections 565, 566, C. C. Pr.

The reference in Section 63 (Insolvent Law) is to the "general laws"—to all of them, and not to a part.

Now, while Section 564, C. C. Pr., says that a receiver may, in certain cases, be appointed by the Court or Judge, Section 565 says, that in a certain other case the *Court* alone may appoint; and Section 566 says, in effect, that an *ex parte* appointment can only be made by the *Court*, and there is no provision any where for an *ex parte* appointment by the *Judge*.

The distinction between the Court and the Judge at chambers, is well settled, and the undisputed rule is that all judicial proceedings must take place in Court, and that no action at chambers is valid unless expressly authorized by statute. (*Newman v. Hammond*, 46 Ind. 119; *Ferger v. Wesler*, 35 id. 53; *Ex parte Smith*, 23 Ala. 94-114; *Cummings v. Des Moines, etc. R. R. Co.*, 36 Iowa, 173; *United States ex rel. Boyd v. Lockwood*, 1 Pinney (Wis.) 359; *Bennett v. Cooper*, 57 Barb. 642; *Parks v. Sprinkle*, 64 N. C. 637; *Mann v. Tyler*, 6 How. Pr. 235; *Bangs, Receiver etc., v. Selden*, 13 id. 375; *Cayuga Bank v. Warfield*, 13 id. 439; *Gardner v. The Com. of Warren*, 10 id. 181; *Re Walker*, 2 Duer, 655; *Van Schaick v. Winne*, 8 How. Pr. 5; *Mather's Case*, 14 Abb. Pr. 45; *Aymar v. Chace*, 12 Barb. 301; *Ex parte Gay*, 20 La. Ann. 176; *Loomis v. Andrews*, 49 Cal. 239; *Bond v. Pacheco*, 30 id. 531; *Larco v. Cosaneuva*, 30 id. 565; *Brennan v. Gaston*, 17 id. 375; *Haegler v. Henckell*, 27 id. 491-2; *Norwood v. Kentfield*, 34 id. 330; *Bennett v. Southard*, 35 id. 691; *Livermore v. Hodgkins*, 54 id. 637; *Wicks v. Ludwig*, 9 id. 175.)

This same distinction runs through the C. C. Pr. a few sections of which we cite: §§ 73, 74, 124, 133, 134, 135, 139, 140, 142, 143, 166, 176, 564, 565, 480, 525, 556, 554, 555. These citations could be extended *ad libitum*.

No warrant can be found for the order made at chambers in Section 166, C. C. Pr., which prescribes what a Judge may do at chambers. That section provides that a Judge at chambers may "grant all orders and writs which are usually

granted in the first instance upon an *ex parte* application," etc.

The cases cited from our own reports show that the order here in question does not fall within that section. And Section 566, C. C. Pr., show that no *ex parte* appointment of a receiver can be made by a Judge.

In addition, the established practice in chancery was, and is, not to appoint a receiver except upon notice and after a hearing.

The only exception was where the defendant was about to depart from the jurisdiction or there was extreme danger that the subject-matter would escape from the Court; and in that case all the facts showing that notice ought not to be required had to be fully and specifically set forth in the bill of complaint so that the Chancellor could act upon them judicially, and no general allegations would answer. (*Bisson v. Curry*, 35 Iowa, 72-80; *French v. Gifford*, 30 id. 160-1; *Whitehead v. Wooton*, 43 Miss. 523; *Bostwick v. Isbell*, 41 Conn. 305; *State v. The J. P. & M. R. R. Co.*, 15 Fla. 281-2.)

Saffold & Meux and *John J. Roche*, for Respondents.

It is not denied that the power existed to make the appointment, but it is insisted that the order complained of is void because made by the Judge at chambers. We have shown that by the fundamental law of the land the Court was open on that day for the transaction of business. That the Judge of the Court sat in a side room, and not upon the elevated seat ordinarily occupied by him when hearing the cause, makes no difference; the act was that of the Court. (*Brewster v. Ludekins*, 19 Cal. 170.)

It is true that the word Judge is not used in the act; and counsel claim, therefore, that the Court can do no insolvency business at Chambers.

We do not so interpret the meaning and intent of the Legislature; we do not think it was intended that these customary powers, exercised by chancellors and judges of bankrupt and insolvency courts, both State and Federal, from time immemorial, were intended to be lopped off or changed. We think it is clearly indicated that the Legislature, knowing

that the Court was to be always open, intended and meant that the act of the Judge was but the act of the Court.

The truth is, that in the Insolvency Act the words Court and Judge are convertible terms. (*Brewster v. Ludekins*, 19 Cal. 170.)

The action of the Judge at Chambers is none the less the action of the Court. The acts in his official capacity and a judgment rendered at Chambers is the judgment of the Court, and is appealable. (*Brewster v. Hartley*, 37 Cal. 23; *Bennett v. Wallace*, 43 id. 25.)

But in order to set at rest any question about what was intended, when application should be made for the appointment of a receiver, which very often must be done hurriedly, in order to take the property from unscrupulous and dishonest debtors, the Legislature referred to the general statutes on the subject. This certainly must mean something. Counsel try to fritter it away; but this can not be done; a familiar maxim is *ut res magis valeat quam pereat*. It was intended that the general laws of the State governing the *appointment*, qualification and powers of receivers, should govern in cases of insolvency. (Act 1880, § 63, Subd. § 2; Code Civ. Proc. § 564 *et seq.*)

Where the statute authorizes proceedings against an insolvent corporation, for the purpose of winding up its affairs in insolvency, it is one of the usual and ordinary powers of a Court of Equity to appoint a receiver to take charge of its assets, and when their management is in the hands of dishonest officers the Court can exercise no discretion in the matter. (High on Receivers, § 343-347; *Nichols v. Perry Pat. Arm Co.*, 3 Stock. 126; Story's Eq. Jur., §§ 829-839; Dan'l Choy Pl. and Pr., 1715 *et seq.*; *State v. Northern Cent. R. R.*, 18 Md. 193; *Tripp v. Chard Railway*, 21 Eng. L. & Eq. 53.)

If, then, this is a case where Courts of Equity, possessing the power to do so, would ordinarily appoint a receiver, it falls directly within the provisions of Subd. Sec. 2 of Section 63 of the Insolvent Act. (*Goodale v. Fifteenth Dist. Ct.*, 56 Cal. 26.)

Here we can only consider whether the Court had, upon any state of facts, jurisdiction to make the appointment at

Chambers. (*Ex parte Cohen*, 5 Cal. 495; *Goodale v. Fifteenth Dist. Ct.*, 56 id. 26.)

THE COURT:

The Real Estate and Building Associates, on petition, obtained from this Court an order that the Superior Court, in and for the City and County of San Francisco, Department Ten, and Hon. Charles Halsey, judge thereof, show cause why a writ of review should not issue, to review certain proceedings had before said Judge concerning the appointment of a receiver. The respondent objected to the granting of the writ, such objection being in the nature of a demurrer to the petition.

Section 63 of the Insolvent Act of 1880 says: "A receiver may be appointed by the Court," etc. It is claimed that this language limits the appointment to the *Court* when in session as such, and that the judge in chambers can not make the appointment. The latter part of the section provides that the *appointment*, etc., shall in all respects be regulated by the general laws applicable to receivers. Section 564, C. C. P. (which is a portion of the general laws applicable to receivers), provides that a receiver may be appointed by the Court or the Judge thereof, and Section 566 recognizes the appointment of a receiver upon an *ex parte* application. Section 166, C. C. P., authorizes a Judge of a Superior Court to grant, *at chambers*, all orders and writs which are usually granted in the first instance upon an *ex parte* application, and to hear and dispose of such orders and writs. Regarding these various sections together, we are of opinion that the Judge may, in an insolvency proceeding, *ex parte*, and at chambers, appoint a receiver.

It does not appear from the petition in this case, whether the order appointing a receiver was made with or without notice; nor does it appear but that the Court was fully justified in directing its officer to take possession of the property named, for the purpose of holding it until an adjudication should be had. This writ goes only in cases of *excess of jurisdiction*. It may be that the allegations of the petitioner for the appointment of the receiver showed a case in which

it was eminently proper that the hand of the law, by a receiver, should be interposed.

The objections of the respondent are sustained, the order to show cause is discharged, and the order staying proceedings in the lower Court is revoked.

McKINSTRY, J., dissented.

Ross, J., expressed no opinion.

[No. 6,886.—In Bank.]
March 14, 1882.

M. H. WALSH v. J. M. HUTCHINGS ET AL.

APPEAL FROM ORDER—RECORD—TRANSCRIPT—IDENTIFICATION OF PAPERS—

BILL OF EXCEPTIONS—CLERK'S CERTIFICATE.—Upon an appeal from an order, opening a default, papers appeared in the transcript as printed, purporting to be an affidavit of the defendant, and a counter-affidavit of the plaintiff; and there was a certificate of the Clerk, that the transcript contained full, true, and correct copies of all papers used upon the hearing of the motion, in the Court below; but there was no bill of exceptions or certificate of the Judge as to the identity of the papers.

Held: It is not for the Clerk to determine what papers or evidence the Court acted upon; and his certificate must be disregarded.

APPEAL from an order of the Thirteenth District Court of the County of Merced.

J. K. Law, for Appellant.

R. H. Ward and *P. D. Wigginton*, for Respondent.

MYRICK, J.:

This is an appeal from an order setting aside a default judgment entered against the defendant. The action was commenced in the District Court in and for the county of Merced, and the summons was served on the defendant in the city and county of San Francisco, October 11, 1879. The default and judgment were entered by the Clerk November 26, 1879. The defendant moved to vacate the judgment and set aside the default, and for leave to answer, which motion was granted

by the Court. Papers appear in the transcript as printed purporting to be an affidavit of the defendant, and a counter affidavit of the plaintiff; but there is no bill of exceptions, and the Judge of the Court below does not certify or identify these papers as having been used on the motion. It is true, the Clerk of the Court below certifies that the transcript "contains full, true and correct copies of all papers used on the hearing in said District Court on the motion of said defendant Hutchings to set aside said default and judgment;" but it is not for the Clerk to determine what papers or evidence the Court acted upon. Disregarding these papers, it does not appear that the Court was not justified under Section 473, C. C. P., in making the order.

Order affirmed.

McKEE, SHARPSTEIN, and THORNTON, JJ., concurred.

McKINSTRY, J., concurred in the judgment.

MORRISON, C. J., also concurred in the judgment.

[No. 7,292.—In Bank.]

March 15, 1882.

JOHN W. HINDS v. MANUEL MARMOLEJO ET AL.

NATIONAL BANK—LIMITATION ON RATE OF INTEREST.—Section 30 of the National Banking Act (Rev. Stats. § 5197) provides: "Every association organized under this Act may take, receive, reserve and charge on any loans * * * interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more; except that where by the laws of the State, a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed every association organized in any State under this Act."

Held: Under this section—construed with § 1918 C. C.—the national banks in this State are allowed to charge and receive such rates of interest as may be agreed upon.

APPEAL from a judgment for the plaintiff in the Twentieth District Court of the County of Santa Clara. BELDEN, J.

1. *Farmers' N. G. B. v. Stover*, 80 Cal. 393.

S. F. Leib, for Appellant.

By the terms of Section 5197 of the Revised Statutes of the U. S., page 10,111, it appears that the rates of interest which national banks may charge is regulated by the condition of the laws of the State where the bank is located upon the general subject of interest.

It is claimed by appellants that no rate of interest is *fixed* by the laws of this State, and therefore, that clause of the section of the Revised Statutes above cited, which provides "where no rate of interest is fixed by the laws of any State, Territory or District, the bank may take, receive, reserve or charge a rate not exceeding seven per centum," limits the right of national banks upon the subject of interest, in the State of California.

At common law there were no rates of interest *fixed*. Parties might agree for the payment of any rate of interest they deemed proper, and that rate, however high, was legal.

If the statutes of the State of California had been silent upon the subject of interest, the rule of the common law would have been enforced, and parties might have agreed for the payment of any rate of interest, and it would have been allowed according to the terms of the agreement. Yet it cannot be disputed that under such circumstances, national banks would have been restricted in this State to the rate of seven per cent interest upon loans, by this clause of the National Banking Act. Otherwise it could never have any force or effect. (*Crocker v. First National Bank of Chetopa*; *Thompson Nat. Bank Cases*, 317; *In Re Wild Thompson Nat. Bank Cases*, id. 346; *Johnson v. Nat. Bank of Cloverdale*, 74 N. Y. 329.)

The statutes of the State of California provide that "unless there is an express contract in writing, fixing a different rate, interest is payable on all moneys at the rate of seven per cent per annum." (C. C. § 1917.) This is the only provision whereby, according to any known rules of construction, any rate of interest is *fixed* by the laws of this State.

S. J. Hinds, for Respondent.

The position of the respondent upon the construction of the language of this section of the National Banking Act.

which was adopted by the Court below, and the one now urged for consideration, is that in regard to the rates of interest to be charged by national banks, instead of providing rates of its own for such banks, Congress simply provided that the State regulations of interest should be the regulation for them, and that if the local governments did not see proper to regulate the matter, Congress would do so as far as the national associations were concerned. (*Tiffany v. National Bank of Missouri*, 18 Wall. 409; *The First National Bank v. Mount Pleasant*, U. S. C. C. for the Western Dist. of Penn. Bankers' Magazine, Vol. 13, No. 1, July 18, 1878; *First Nat. Bank of Mt. Pleasant v. Tinstman*, Bankers' Magazine, Vol. 13, No. 9, page 728.)

Ross, J.:

The sole point made by the appellants in this case is that, in this State, a national bank has no right to charge or receive a higher rate of interest upon money loaned than seven per cent per annum. Section 30 of the National Banking Act provides:

"Every association organized under this Act may take, receive, reserve and charge on any loans * * * interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more; except that where, by the laws of any State, a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed every association organized in any State under this Act. And when no rate is fixed by the laws of the State or Territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum."

By the first clause of this section national banks are authorized to charge and receive interest at the rate *allowed* by the laws of the State or Territory where the bank is located, and, by the last clause, when no rate is *fixed* by the laws of the State or Territory, they are allowed a rate not exceeding seven per centum. Reading the entire section, and considering the two clauses together, as they must be considered, we are of the opinion that the word "fixed" used in the last clause is used in the same sense as the word "allowed" in the first clause, and that by the words "the laws of

the State or Territory" is meant *statute* laws. In other words, that the true interpretation of the Act of Congress is, that in those States and Territories having no statute upon the subject of interest, the national banks are allowed a rate not exceeding seven per centum, while in those States and Territories having a statute on the subject, they are authorized to charge and receive interest at the rate allowed other banks and individuals. From this view it follows that inasmuch as we have in California a statute (Civil Code, Section 1918), providing "that parties may agree, in writing, for the payment of any rate of interest, and it shall be allowed according to the terms of the agreement until the entry of judgment," the national banks are also allowed to charge and receive such rates of interest as may be agreed on.

We do not find any of the authorities cited by either of the parties to this controversy directly in point, but think the views here expressed find support in the case of *Tiffany v. National Bank of Missouri*, 18 Wall. 409, and are not in conflict with the decision in *Johnson v. National Bank of Gloversville*, 74 N. Y. 329.

Judgment affirmed.

SHARPSTEIN, MCKEE, THORNTON, JJ., MORRISON, C. J., and MYRICK, J., concurred.

[No. 7,431.—In Bank.]

March 15, 1882.

ESTATE OF MICHAEL CALAHAN.

APPEAL IN PROBATE PROCEEDINGS—APPEALABLE ORDER.—Appeal from an order vacating a decree of distribution.

Held: Appealable judgments and orders in probate proceedings are all enumerated in the third Subdivision of Section 963, Code of Civil Procedure; and as the order appealed from is not therein mentioned, it is not an appealable order.

APPEAL from an order of the Superior Court of the County of Santa Clara. SPENCER, J.

1. *Estate of Dean*, 82 Cal. 614; *Harris v. Harris*, 87 Cal. 457.

Houghton and Reynolds, for Appellant.

W. P. Veuve and D. M. Delmas, for Respondents.

The COURT:

This is an appeal from an order of the Superior Court vacating a decree of distribution and settlement of the final account of the executor.

The first question that arises is whether that is an appealable order. The Code (§ 963, C. C. P.) provides in what cases an appeal may be taken from a Superior Court to the Supreme Court. The cases are divided into three classes: 1. Final judgments of Superior Courts; 2. Certain enumerated orders and interlocutory judgments; 3. From certain specified judgments or orders made in probate proceedings.

It is quite clear that the first and second classes embrace judgments and orders other than those made in probate proceedings, and that the third class embraces only such as are made in such proceedings. And the order from which this appeal is taken is not among those enumerated in the third class. Among those enumerated in this class are judgments or orders "settling an account of an executor or administrator," and "refusing, allowing, or directing the distribution of an estate or any part thereof." But no mention is made of an order vacating any such order. There is a provision in Subdivision 2, for an appeal "from any special order made after final judgment." But we think that the final judgment there referred to is the one mentioned in Subdivision 1, viz.: "A final judgment in an action or special proceeding commenced in a Superior Court, or brought into a Superior Court from another Court." It seems to us quite clear that the appealable judgments and orders made in probate proceedings, are all enumerated in Subdivision 3; and as this order is not therein mentioned, it is not an appealable order.

Appeal dismissed.

[No. 8,246.—In Bank.]
March 20, 1882.

TARTAN SMITH v. D. N. ARNOLD.

DISMISSAL OF APPEAL.—Appeal dismissed for failure to file transcript within the time prescribed by the rules.

MOTION to dismiss an appeal from a judgment for the plaintiff and from an order denying a new trial in the Superior Court of Colusa County.

The appeal was perfected December 10, 1881. Notice of motion to dismiss was served January 27, 1882, by leaving a copy in the office of appellant's attorney. The transcript was served on respondent and deposited in Wells, Fargo & Co.'s express for transmission to the Clerk of the Supreme Court January 30, 1882, and received by the Clerk February 1, 1882. The affidavit of appellant's attorney states in effect that owing to unexpected and unavoidable delays on the part of the printer the printing of the transcript was not completed until January 27th, and that he did not receive a copy of the notice until January 30th, and that when he received it he was on his way to the office of respondent's attorneys to serve the transcript.

Hart & Hart, for Respondents.

John C. Deuel, for Appellant.

The COURT:

The transcript was not filed in this Court within the forty days after the appeal was perfected, nor was it filed before the notice to dismiss the appeal was given. No sufficient excuse has been shown why it was not so filed, and no application was made to this Court before the expiration of the forty days for an extension of the time to file the transcript. (Rules 1-11.)

Appeal dismissed.

[No. 7,037.—Department One.]

March 20, 1882.

G. CEREGHINO ET AL. v. F. H. HAMMER.

GUARANTY—CONSTRUCTION OF CONTRACT.—The defendant executed to the plaintiff two guaranties, one in the words and figures following, and the other similar except in the name of the debtor. “I do hereby guarantee the payment of this bill against P. * * * (provided said P. acknowledges the amount herein as correct) payment to be made out of the proceeds of his crop for the season of 1876, on or before October 1, 1876.

Held: The guaranties sued upon are conditional. The obligation assumed by the guarantor did not extend beyond the amount which should be by him received from the crop clear of incidental expenses. It was for the plaintiff to establish that the condition had happened which made the defendant liable.

APPEAL from an order of the Nineteenth District Court of the City and County of San Francisco. WHEELER, J.

The first count of the complaint, after alleging the execution of the guaranty sued upon, alleged that afterwards, and before the first day of October, A. D., 1876, the crop of the said P. Albaran for the season of 1876, and the proceeds thereof, came into the possession of and were received by the said defendant.

The second count was similar.

These allegations were denied, and the Court found that there was never, at any time, any proceeds of said crop of the season of 1876, and no proceeds thereof came into the possession of the defendant.

Fox & Kellogg, for Appellants.

Under the pleadings and evidence the judgment should have been for plaintiffs. All the allegations of the complaint were admitted, except the immaterial ones of “consideration” and “proceeds” of crop. The Court expressly finds that there was a valuable consideration.

The pleadings admit that there was a crop, and that it came into the hands of defendant. The law therefore presumes that there were “proceeds.” Defendant denies this presumption, but he made no proof in support of that denial, and it still stands as a presumption in favor of plaintiff, who was

not bound to support it by proof until the presumption was rebutted.

The averment of the complaint was that the crop itself came into the hands of defendant. This was admitted. The additional averment in regard to "proceeds of the crop," therefore, became and was immaterial, and a denial of that immaterial allegation raised no issue. Receiving, as he admits he did, the law presumes he had, in some form, the proceeds thereof, and if he did not, the burden was upon him to prove it, and he made no attempt to do it.

The liability of the defendant in this case does not depend upon the sufficiency of the crop, or of the proceeds thereof. (*Wadsworth v. Smith*, 43 Iowa, 439.)

No stringent rule of construction should be applied to this contract, in favor of defendant, more than to any other. (*Gates v. McKee*, 13 N. Y. 232.)

If anything it must be construed most strongly against the guarantor. (*Walrath v. Thompson*, 4 Hill, 200.)

Wm. M. Pierson, for Respondent.

It is claimed, that under the pleadings judgment should have gone for the plaintiffs. In the discussion of this question, it will be necessary to ascertain, 1. Was the guaranty an absolute or conditional one? and, 2. If conditional, was there any admission in the pleadings, that the condition had happened (for there was no evidence offered)?

I. There is no rule better settled than that a contract is to be construed as a whole, and that each provision of it is to be regarded, unless plainly repugnant to the remainder of the contract. (2 Parson's Contracts, (6th Ed.) 527, citing *Tindall C. J.*, and *Lord Ellenborough*.)

As to the interpretation of contracts of guaranty, the following rules are laid down in an exceedingly elaborate and exhaustive opinion, after a review of the English and American cases: "1. In general, guaranties are governed by the same rules of construction as other contracts. 2. In case of ambiguity, the language is construed most strongly against the guarantor. 3. It is the duty of the Court to ascertain and give effect to the intention of the parties. 4. In order to arrive at the intention of the parties, the circumstances under

which, and the purposes for which, the contract was made, may be proved and must be kept in view in its construction." (*Crest v. Burlingame*, 62 Barb. (N. Y.) 351.)

Where there is no ambiguity in the contract, and where, as in contracts of guaranty, the liability is purely gratuitous, and proceeding from no moral obligation, the rule is narrowed to a strict construction of the agreement. Thus, in *McCloskey v. Cromwell*, 11 N. Y. 598, the principle is clearly enunciated, that "the liability of sureties is always *strictissimi juris*, and shall not be extended by construction." (*Carson Opera House v. Miller*, 8 Pac. C. L. J. 913; *Dobbin v. Bradley*, 17 Wend. 422; *Bethune v. Dozier*, 10 Ga. 240.)

Our own Civil Code recognizes the same rule of construction of contracts of this character. "A guarantee is to be deemed unconditional, unless its terms import some condition precedent to the liability of the grantor. (Civ. Code, § 2806.) If the contract in suit be read by the light of these principles, there can be no question as to its true meaning. Invert the clauses of it and the agreement is, that "out of the proceeds of Albaran's crop of 1876, I guarantee the payment of this bill." No other construction can be indulged in, unless a material part of the contract is utterly sacrificed, and to exclude that part from consideration, is to clearly violate the rule that the whole contract is to be regarded.

Counsel for the plaintiffs are compelled to reject the last clause of the agreement entirely, in order to maintain their view. No such construction can be maintained without doing violence to the plain meaning of plain words, without degrading the obvious intention of the parties, and distorting the language employed by them. (*Gibb v. Probst*, 2 Cal. 117; *Heming v. Trenery*, 2 Crompton, Meesy & Roscoe, 385; *Moor v. Roberts*, 3 C. B. (N. S.) 829; *Wolf v. Marsh*, 54 Cal. 228; *Gelpcke v. Dubuque*, 1 Wall. 206.)

II. Has the condition happened ?

The defendant guarantees, that out of the "proceeds" of a certain crop, he will pay the claim of another, and it is admitted that there were no proceeds, for there is no evidence that there ever were any. How has the contingency happened ? Plaintiffs' counsel attempts to skirt the difficulty, by announcing that the defendant should have proved that the

crop yielded no proceeds. But counsel evidently overlooks the elementary rule, that where an allegation of the complaint is denied, the burden of the proof is cast on the plaintiff; and in this case the allegation that there were "proceeds," is specifically denied under the oath of the defendant. It is replied however, that the answer admits that the defendant received the crop, and that the defendant was called as a witness and then withdrawn, all of which, it is gravely argued, proves that there were "proceeds." The force of this logic is not perceptible. The fact that there was a crop no more involves the conclusion that it was worth anything or produced anything, than the fact that there was "a season of 1876" involves the conclusion that there was a crop.

The truth is the plaintiff is seeking to throw upon the defendant the proof of that which the pleadings cast upon the plaintiff.

The guaranties sued upon are conditional; the promise of defendant is to pay "out of the proceeds" of the crop of Pedro Albaran for the season of 1876.

The COURT:

The parties evidently had in contemplation the net proceeds. It will not be presumed that the guarantor assumed an obligation beyond the amount which should be by him received from the crop, clear of incidental expenses. It was for plaintiff to establish that the condition had happened which made defendant liable—that there were proceeds.

Judgment and order affirmed.

[No. 7,127.—Department Two.]

March 21, 1882.

JOHN NICHOLL v. JOHN W. LITTLEFIELD ET AL.

APPEAL FROM A JUDGMENT OF NONSUIT.—RECORD ON APPEAL.—Appeal from a judgment of non-suit. There was no statement or bill of exceptions setting forth the evidence on which the Court granted the motion. *Held*: The ruling of the Court can not be reviewed.

APPEAL from a judgment for the defendants in the Fifteenth District Court of the City and County of San Francisco. EDMOND, J.

The judgment appealed from contains the following recital:

This cause came on regularly before the Court for trial on the twenty-fourth day of February, A. D. 1880. J. B. Mhoon, Esq., appearing for the plaintiff and B. S. Brooks, Esq., appearing for the defendant, whereupon counsel for plaintiff opened his case and stated to the Court the facts which he intended and expected to be able to prove; thereupon the counsel for defendant moved the Court to nonsuit the plaintiff, and render judgment in favor of defendant upon the ground that the said facts were not sufficient to constitute a cause of action or to entitle the plaintiff to any judgment against the defendant under the pleadings. Said motion was thereupon argued and submitted to the Court for consideration and due deliberation having been had thereon the said motion was granted.

Flournoy, Mhoon, and Flournoy, for Appellant.

This appeal is from the judgment on the judgment roll. In such case no bill of exception or statement is necessary. (*Jones v. Petaluma*, 36 Cal. 230.)

"When an appeal is taken on the judgment roll alone, and no statement is made, a specification of the ground of error is not required to be inserted in the transcript." (*Hutton v. Reed*, 25 Cal. 478.)

In the case at bar, it appears from the judgment that the attorney stated the facts that he expected to prove, and inferentially that the complaint was read. That is to say, the attorney stated both the probative facts which he expected to prove, and the ultimate facts necessary to make his case, as they are recited in the complaint.

B. S. Brooks, for Respondent.

"It was not error to nonsuit the plaintiff upon the opening statement of counsel." (*Hoffman v. Felt*, No. 1,317, Oct. T. 1867; *LeRoy v. Milliken*, No. 7,300, Nov. 21, 1881; *Raimond*

v. *Eldridge*, 43 Cal. 506; *Harris v. McGregor*, 29 id. 124.) If there was any error of the Court in so doing that error could only be reviewed upon motion for new trial, or appeal upon a bill of exceptions. (*Levy v. Getleson*, 27 Cal. 687, 688; *Ringgold v. Haven*, 1 id. 108.)

There is no statement or bill of exceptions in the record—nothing from which this Court can know what the opening statement of counsel was, or whether the action of the Court was right or wrong. (*Morris v. Angle*, 42 Cal. 236; *Harper v. Minor*, 27 id. 107; *Nelson v. Mitchell*, 10 id. 92; *Freeborn v. Glazer*, 10 id. 337; *Gates v. Walker*, 35 id. 289; *Poole v. Caulfield*, 45 id. 107; *Stoddart v. Burge*, 53 id. 394.)

When the Court can not ascertain from the record whether the Court below erred in granting the nonsuit the judgment must be affirmed. (*Todd v. Winants*, 36 Cal. 129)

The COURT:

The only question to which our attention is called in this case relates to the decision of the Court below in granting a nonsuit. That the cause took this course on the trial appears from a recital in the judgment entry found in the transcript. There is no statement or bill of exceptions setting forth the evidence on which the Court determined to grant the motion for a nonsuit. Such being the case, the ruling of the Court below can not be reviewed here. (*Levy v. Getleson*, 27 Cal. 685; *Ringgold v. Haven*, 1 id. 108.)

Judgment affirmed.

[No. 7,269.—In Bank.]

March 21, 1882.

JAMES SEEHORN v. BIG MEADOWS AND BODIE WAGON ROAD CO.

SUPPLEMENTAL ANSWER—DISCRETION OF COURT—ABUSE OF DISCRETION.—

The Court below, under the circumstances stated in the opinion, refused leave to the defendant to file a supplemental answer setting up a release by the plaintiff of his claim.

Held: The Court should have permitted the defendant to plead the release. (McKINSTRY, J., and ROSS, J., dissenting.)

APPEAL from a judgment for the plaintiff and from an order denying a new trial in the Superior Court of the County of Mono. BRIGGS, J.

The following extract from the statement on motion for a new trial is inserted in order to show the facts of the case:

At the opening of the Court on the morning of seventh day of March, A. D. 1880, the defendant appearing by its attorneys, T. W. W. Davies and Frank Owen, and the plaintiff by his attorneys, Messrs. Reddy, Gorham, and Parker, (a jury having been regularly impaneled to try the above entitled cause on the afternoon of the previous day,) the defendant, by its counsel, moved the Court for leave to file an additional pleading, averring and alleging that since the last trial of this cause there had been a full and final settlement of all matters embraced in this cause, and set forth in plaintiff's amended complaint; and that a full release and satisfaction had been made and delivered by said plaintiff to this defendant. Counsel for defendant also stated to the Court that he should have been in attendance on the Court on the previous day, but was unavoidably prevented by reason of interruption of travel; that no one of defendant's counsel who had actively participated in the former trials of this cause was present, having been notified by defendant that said cause was settled, and that they would not be required further; that Frank Owen, attorney for defendant, having been but slightly connected with the former trials, and knowing that John R. Kittrell and T. W. W. Davies, leading attorneys of the defendant, would be present on the morning of the seventh April, had not felt it his duty to assume the responsibility of pleading said release, and that said Owen, attorney for defendant, was fully advised, before the impaneling of the jury, of the existence of said alleged release, and the Court was not advised of any alleged settlement until now, the second day of trial and after the impaneling of the jury; and that said release had been obtained, and all the negotiations concerning the same had been had, without any participation or knowledge of the same by any attorney of defendant.

Said additional pleading, which defendant moved for leave to make, was in writing, and submitted to the inspection of

the Court, and a copy of the same was furnished to plaintiff's attorneys, and is in words and figures as follows, to wit:

"EXHIBIT 'B.'"

"Now comes the above named defendant, by its attorneys, T. W. W. Davies and Frank Owen, and by leave of the Court first had and obtained, amends its answer herein on file as follows, viz: Defendant alleges that on the 29th day of March, 1880, for a valuable consideration, said plaintiff fully discharged and released this defendant from all damages whatsoever which he (said plaintiff) had against this defendant, and especially releasing said defendant from all claim for damages alleged to be due said plaintiff from said defendant in the amended complaint herein on file.

"T. W. W. DAVIES,

"FRANK OWEN,

"Attorneys for defendant."

That after argument the Court overruled and denied defendant's motion, said motion being objected to by plaintiff's counsel, to which ruling of the Court the defendant, by its counsel, then and there duly excepted, which exception was by the Court allowed and ordered entered.

On the 8th April, 1880, and after plaintiff had closed his case in chief, and after defendant's counsel had made his opening statement in the case, relying on contributory negligence of plaintiff and the absence of negligence by defendant, the defendant, by its attorneys, moved the Court for leave to file a supplemental answer, submitting the same in writing to the Court, and delivering a copy thereof to the plaintiff's attorneys, and making profert of the release, which supplemental answer is in words and figures as follows, to wit:

"EXHIBIT 'C.'"

"Now comes the defendant by its attorneys, by leave of the Court first obtained, and files this its supplemental answer, and avers and shows that heretofore, to wit: On the 29th day of March, A. D. 1880, and since the last trial of this cause, the plaintiff, James A. Seehorn, has made and delivered to this defendant, for a valuable consideration, a full release, dis-

charge, and satisfaction of all claims and demands, of every name and kind, between this plaintiff and the defendant, and especially a full release, discharge, and satisfaction of all claims and demands averred in this amended complaint of plaintiff on file in this Court in this cause.

"Wherefore, defendant prays that this action be dismissed.

"PAUL W. BENNETT,

"FRANK OWEN,

"T. W. W. DAVIES,

"Attorneys for defendant."

Reasons of the Court for refusing defendant's motion to file supplemental answer.

In the above entitled cause two jury trials had been had, in each of which the jury failed to find a verdict. By mutual agreement of parties the cause was set down for trial on the sixth day of April, 1880, and a venire of sixty jurors ordered by the Court. On said sixth day of April the plaintiff appeared by his attorneys, and the defendant by one of its attorneys, Frank Owen, Esq. The case being called, the parties proceeded to impanel a jury of twelve men; the jury was duly sworn to try the cause. The hour being late, the Court adjourned until the next morning at ten o'clock. On the assembling of the Court the jury answered to their names and took their seats in the jury box, and plaintiff's attorney opened his case to the jury, after which and for the first time defendant's attorneys, and without any previous notice thereof, asked leave of the Court to file an amended answer, setting forth full accord and satisfaction of plaintiff's demand. At this point of the proceedings, all the attorneys for the defendant present disclaimed all knowledge or participation in the settlement purported to have been had between plaintiff and defendant, and that such knowledge came to them after said settlement. Frank Owen, Esq., one of the attorneys for the defendant, stated that he had knowledge of the settlement before the impaneling of the jury; that is, that he had been informed that such settlement had been made, but after the making of such settlement.

It further appears that plaintiff's attorneys were ignorant of the settlement until the second day after impaneling the

jury, and claim that they were taken completely by surprise up to the motion to file said amended answer. The Court had no knowledge that any settlement had taken place between plaintiff and defendant.

After argument *pro* and *con*, the Court overruled the motion to file said amended answer, to which ruling counsel for defendant duly excepted.

On presenting the motion to amend the answer and on statement of the facts that said settlement had been made without the knowledge of the attorneys for plaintiff and defendants, General Kittrell, one of the principal attorneys for defendant, addressed the Court, and said that the course pursued by the parties in making the settlement without the knowledge of the attorneys was not warranted in the honorable practice of law; denounced in strong language the alleged settlement, and the manner in which it was brought before the Court; asked leave to withdraw as an attorney from the case, and that his name no longer appear as an attorney therein, which was granted. The plaintiff's attorney then proceeded to introduce his evidence in support of plaintiff's action. At the close of plaintiff's testimony defendant's attorney stated his case to the jury, and that he relied upon contributory negligence as a defense.

That before proceeding to examine the witnesses for defendant, defendant's attorney moved the Court for leave to file a supplemental answer, setting forth a payment by defendant to plaintiff, of a certain sum of money, in full satisfaction of plaintiff's demand against defendant.

This motion the Court refused, for the following reasons, to wit: Because it appears that the pretended settlement was made on the 29th day of March, 1880, and that the same was kept a profound secret from the Court and from plaintiff's attorneys. That jury was permitted to be impaneled before any such settlement was made known to the Court. That said pretended settlement does not come before the Court with that fairness and honesty that should characterize proceedings in Courts of justice.

This Court is of the opinion that such practice is reprehensible, and not to be tolerated. That the manner in which said pretended settlement was brought before the Court can-

not be regarded in any other light than that of trifling with the Court. The plaintiff in the case having disappeared from the country, the Court has no knowledge in what manner or by what means, whether just or unjust, said pretended settlement was brought about.

The fact that said pretended settlement was kept a secret from the attorneys for both parties, at the time of the making thereof, and from the knowledge of the Court, until after the impaneling of the jury, taints said settlement with grave suspicions of the fairness and integrity of said pretended settlement.

R. M. BRIGGS,

Superior Judge of Mono County, California.

To which ruling of the Court the defendant by its counsel, then and there duly excepted, which exception was by the Court allowed and ordered entered.

T. W. W. Davis, for Appellant.

It is urged that affidavits should have been presented to show the Court below that the plea of release was a true plea. We submit that when we offered all the original papers with offers to prove the same by the attesting witnesses, and also offered parol proof that the sum of two thousand dollars had been actually paid, and to show fully the *bona fides* of the transaction, the offer was better than any affidavit.

In *Houghton v. Heath*, 9 Abb. Pr. (N. S.) p. 275, the Court says: "Even where affidavits are filed, averring the falsity of the amended answer, the Court will not refuse leave to amend, unless the proposed amended answer is so plainly sham that it would be stricken out on motion. Even if the affidavits strongly preponderate against the truth of the pleading, the Court leaves the fact to be tried as an issue in the case, and will not determine the matter by the unsatisfactory method of *ex parte* affidavits." (*Jackson v. Peer*, 4 Conn. 418.) "*When the facts sought to be pleaded in a supplemental answer amount to an entire satisfaction of the cause of action, and if established, would utterly extinguish the plaintiff's right to prosecute it, it is the duty of the Court to allow the motion, (the word may, in such a case, means*

must,) and it will make no difference whether the application be made at the earliest day or not." (*Draught v. Curtiss & Park*, 8 How. Pr. 56; *Broome v. Beardley*, 3 Cal. 173.)

Under the circumstances, we submit that the pleading was promptly and seasonably offered.

• "When seasonably pleaded, it is matter of right and cannot be rejected." (*Sanford v. Sinclair*, 3 Denio, 269; *Tryon v. Isett*, 11 Abb. Pr. (N. S.) 365; *Hoyt v. Sheldon*, 4 Abb. Pr. 59; *Morel v. Gavelly*, 16 id. 269; *Haight v. Holcomb*, 7 id. 210; note to *Wood v. Trustees etc.*, id; *Eager v. Price*, 2 Paige Ch. 335; *Willis v. Chipp*, 9 How. Pr. 568; *Tillotson v. Preston*, 3 Johns. 229; *Williams v. Houghtaling*, 3^d Cow. 37; *Smallwood v. Lewin*, 13 N. J. (2 Beas.) 123; *Brooks v. Moody*, 25 Ark. 452; *Story Eq. § 903*.)

P. Reddy, for Respondent.

The Court did not err in refusing to allow the defendant to file "Exhibit B," for the reason that the matter therein contained, should have been set up by supplemental answer. (Code Civ. Proc. § 464; *Jessup v. King*, 4 Cal. 131; *Van Maren v. Johnson*, 15 id. 308; *McMinn v. O'Connor*, 27 id. 246; *Moss v. Shear*, 30 id. 472; 2 Wait's Pr. 467-468.)

The motion to file a supplemental answer was addressed to the legal discretion of the Court. (*Harding v. Minear*, 54 Cal. 502.) It being a matter of discretion, it cannot be reviewed by this Court as an error of law occurring at the trial under the seventh subdivision of Section 656 of the Code of Civil Procedure of California. (*O'Brien v. Brady*, 23 Cal. 244; *Cockran v. O'Keefe*, 34 id. 557.)

The defendant was guilty of laches in not asking for leave to plead the release by supplemental answer before the jury were impaneled.

It would have been a fraud on the plaintiff to allow it at the time the supplemental answer was offered. (*Medbury v. Swan*, 46 N. Y. 200; *Holyoke et al. v. Adams et al.*, 59 id. 233.)

It was incumbent on the defendant to have supported its motion by an affidavit, showing that the release of which profert was made, had been actually executed by the plaintiff, (the Court could not be presumed to know the signature of the plaintiff), and showing to the Court some reasonable ex-

cuse on the part of the defendant for concealing the fact of the existence of the release from the time it was made until after the jury was impaneled, and for not asking leave to plead it by way of supplemental answer, after the motion to amend answer was denied, and before plaintiff closed his case. (*Desobryet v. Morange*, 18 Johns. 336; *Sanford v. Sinclair*, 3 Denio, 269; *Harding v. Minear*, 54 Cal. 502.)

MORRISON, C. J.:

The plaintiff brought this action in the late District Court of Mono County to recover damages for injuries sustained by him through the alleged carelessness of an employee of the defendant. The case was set down for trial on the sixth day of April, 1880, and on that day the plaintiff appeared by his attorneys and the defendant by Frank Owens, one of its attorneys, and the parties proceeded to impanel a jury to try the case. The Court then adjourned until the following day. At the opening of the Court on the morning of the seventh day of April, the defendant, by its counsel, moved the Court "for leave to file an additional pleading," averring and alleging "that since the last trial of this cause there had been a full and final settlement of all matters embraced in this cause, and set forth in plaintiff's amended complaint; and that a full release and satisfaction had been made and delivered by said plaintiff to this defendant. Counsel for the defendant also stated to the Court that he should have been in attendance on the Court on the previous day, but was unavoidably prevented by interruption in travel; that no one of the defendant's counsel who had actually participated in the former trials of this cause was present, having been notified by the defendant that said cause was settled, and that they would not be required further; that Frank Owens, attorney for defendant, having been but slightly connected with the former trials, and knowing that John R. Kittrell and T. W. W. Davies, leading attorneys of the defendant, would be present on the morning of the seventh of April, had not felt it his duty to assume the responsibility of pleading said release, and that said Owens, attorney for defendant, was fully advised before the impaneling of the jury of said release; and the Court was not advised of any alleged settlement until now, the

second day of trial and after the impaneling of the jury; and that said release had been obtained, and all the negotiations concerning the same had been had, without any participation or knowledge of the same by any attorney of defendant. That after argument the Court overruled and denied defendant's motion, said motion being objected to by plaintiff's counsel, to which ruling of the Court the defendant, by its counsel, then and there duly excepted."

On the following day after the plaintiff's case was closed the defendant's counsel renewed his motion for leave to file a supplemental answer, which motion was again denied by the Court. The supplemental answer was submitted to the Court, a copy thereof was served upon the plaintiff's attorneys and profert was made of the release. In denying the defendant's motion, the following reasons were given therefor by the Court: "Because it appears that the pretended settlement was made on the twenty-ninth day of March, 1880, and that the same was kept a profound secret from the Court and from plaintiff's attorneys. That a jury was permitted to be impaneled before any such settlement was made known to the Court. That said pretended settlement does not come before the Court with that fairness and honesty that should characterize proceedings in courts of justice. This Court is of the opinion that such practice is reprehensible, and not to be tolerated. That the manner in which said pretended settlement was brought before the Court cannot be regarded in any other light than that of trifling with the Court. The plaintiff in the case having disappeared from the country, the Court has no knowledge in what manner or by what means, whether just or unjust, said pretended settlement was brought about. The fact that said pretended settlement was kept a secret from the attorneys for both parties, at the time of the making thereof, and, from the knowledge of the Court, until after the impaneling of the jury, taints said settlement with grave suspicions of the fairness and integrity of said pretended settlement." The defendant offered in evidence the release, and proof of the execution thereof, together with the proceedings of the Board of Trustees of the defendant, all of which papers were objected to and excluded by the Court. On this appeal, the action of the Court in refusing to allow the defendant to

file a supplemental answer, is assigned as error, and we are asked to reverse the judgment because there was an abuse of judicial discretion in the ruling of the Court below.

By Section 464 of the Code of Civil Procedure it is provided that "the plaintiff and defendant, respectively, may be allowed, on motion, to make a supplemental complaint or answer, alleging facts material to the case, occurring after the former complaint or answer." In the case of *Harding v. Minear*, 54 Cal., 502, Department One of this Court held that "the right to file a supplemental answer is not an absolute and positive right, but is made to depend on the leave of the Court in the exercise of a legal discretion. And, say the Appellate Court of New York, the Court must grant leave unless the motion papers show a case in which the Court may exercise a discretion as to granting or withholding leave. * * The application may be refused, if the new defense, although legal, is inequitable." (*Medbury v. Swan*, 46 N. Y. 200; *Holyoke v. Adams*, 59 Id. 233.)

In the case of *Medbury v. Swan*, *supra*, there was a delay of more than a year in the application to set up a discharge by supplemental answer, and the Court of Appeals held that such application was addressed to the discretion of the Court below. It was further held in that case, that no appeal would lie from the action of the Court on such a motion. But in the latter case of *Holyoke v. Adams*, 59 N. Y., 233, the language of the case in 46 N. Y. is explained, and it is there stated "that generally, a defendant has a right to set up by supplemental answer matter of defense which has occurred or come to his knowledge subsequently to the putting in of his first answer, but that he must apply to the Court by motion for leave so to do, so that the opposite party may be heard, and the Court may determine whether there has been inexcusable laches, or whether any of the reasons appear which are recognized as giving authority for denying the exercise of the general right in this particular instance. And the Court must grant leave unless the motion papers show a case in which the Court may exercise a discretion as to granting or withholding leave. It is claimed that *Medbury v. Swan*, 46 N. Y., 200, is in conflict with this. There may be expressions there which, if separated from the con-

text and from the facts of the case, are susceptible of such interpretation. It is said that 'the right to allege new matter by supplemental pleading is not an absolute and positive right, but is made to depend upon the leave of the Court in the exercise of a legal discretion.' This statement alone would be in conflict with what is now said. But the next sentence in that case explains and limits that which has just been quoted, to wit: 'The application may be refused, if the new defense, although strictly legal, is inequitable, or if the application is not made with reasonable diligence. A party may waive his right altogether, or lose it by *laches*.' What is meant in *Medbury v. Swan*—and, I think, what is there expressed, when the case is taken altogether—is that there is no such absolute, unrestrainable right to plead by a supplemental answer matter newly arisen as that the Court may not control the exercise of the right within the limits which have been long established, by refusing leave thus to answer when long delay has intervened, or fraud is shown, or injustice will be wrought by allowing the new defense. That was a case presenting the question of *laches*. The motion there was denied below upon the ground that *laches* existed."

In the case of *Drought v. Curtiss & Park*, 8 How. Pr. 56, the Supreme Court of New York held, "When the facts asked to be incorporated and pleaded in a supplemental answer, go to divest the plaintiff of the right to maintain the action, and transfer the cause of action to another, who has received satisfaction for the demand involved in it, it is the duty of the Court to grant the motion. The word *may*, in such a case, means *must*; and it will make no difference whether the motion be made at the earliest day or not. The facts amount to an entire *satisfaction* of the cause of action, and whenever pleaded and established, they utterly extinguish the plaintiff's right to prosecute it."

The above case is a very strong one, and it is not necessary for us to hold that the word *may* means *must*, as was held by the Supreme Court of New York. We have no decision in this State which covers the case now in hand; but under the section of the Code (473) relating to amendments of pleadings, it is provided that "the Court *may*, in furtherance of justice, and on such terms as may be just allow a party to

amend any pleading," etc. The case of *Kirstein v. Madden*, 38 Cal. 158, presented for review the action of the District Court in denying a motion for leave to amend an answer pending a motion for judgment on the pleadings, and it was there held that the Court below erred in denying leave to amend. The judgment was for that reason reversed. The above case illustrates the proposition that an abuse of *legal discretion*, vested by the Code in the Court below, is a proper matter of review in this Court.

This brings us to a consideration of the facts presented in the case now before us. The trial of the case commenced on the sixth of April, and a jury was impaneled on that day. The defendant was represented by Mr. Owens, a junior counsel in the case, and Mr. Davies, the senior and leading counsel for defendant, was on his way from Carson City, his place of residence, to Bridgeport, the county seat of Mono County, to attend the trial and take charge of the defense. He started in time to reach Bridgeport before the trial commenced, but was prevented from reaching his destination until the following morning by reason of interruption in the travel. As it was, he traveled all night, and was present at the opening of the Court on the following day. At that time and before any evidence was taken in the case, Mr. Davies moved for leave to file a supplemental pleading, with a view to bring before the Court, and put in issue in the case, the release, which it was claimed, had been executed by the plaintiff to the defendant. The Court refused to allow the supplemental answer to be filed, and proceeded to the trial of the case, upon pleadings which did not allow such defense to be made. The release, it is said, was executed without the knowledge of the attorneys, but the *bona fides* of the transaction was not attacked; and there was no circumstance before the Court, save and except the fact that the attorneys were not consulted in the matter, to cast suspicion upon the settlement of the case, claimed to have been made by the parties thereto. We think there were no laches, and the Court should have permitted the defendant to plead the release. (See *Grady v. Bramlet*, 59 Cal. 105). The Court might have imposed terms upon the defendant, such as the payment of costs, and should have continued the case, if a

continuance had been asked for by the plaintiff. The plaintiff was not present at the trial, "but had disappeared from the country," as the record shows, being satisfied with the amount of two thousand dollars, which it appeared had been paid him, and for which no allowance was made by the jury in fixing the damages awarded by their verdict.

The judgment and order are reversed.

MYRICK, SHARPSTEIN, and THORNTON, JJ., concurred.

McKEE, J., concurring:

I concur in the judgment, for the reason that the denial of the Court below of the motion made by the defendant to file the supplemental answer presented to the Court was, under the circumstances on which the motion was made, an abuse of judicial discretion.

McKINSTRY and ROSS, JJ., dissenting.

We do not understand the facts to be exactly as stated in the foregoing opinion. We adhere to the views expressed when the case was before Department One, and therefore dissent from the judgment now given.

The following is the opinion of Department One referred to:

The COURT:

Upon the case as presented in the transcript we can not say that the evidence was insufficient to show negligence on the part of the employee of defendant in the transaction of the business of his agency. Nor can we declare that there was not evidence to sustain the finding that plaintiff was not guilty of contributory negligence.

It is urged by respondent that the action of the Court below in refusing to allow the supplemental answer was either correct or it was more than error—was an abuse of discretion, and that an abuse of discretion can only be presented by affidavit. (C. C. P. 657, sub. 1.) But by Section 647 of the Code of Civil Procedure, an order refusing to allow an amendment to a pleading is "deemed to have been excepted to."

The ruling of Court deemed to have been excepted to, can be incorporated in a bill of exceptions.

The circumstances under which defendant applied to file an amended or supplemental answer, in the nature of a plea *puis darrein continuance*, were such as justified the Court in denying it. Section 473 of the Code of Civil Procedure, after authorizing an amendment by adding or striking out the name of a party, provides: "The Court may likewise, *in its discretion*, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars." It would seem that whether a party should be allowed to plead a matter arising *puis darrein continuance* was always a matter of discretion. (*Harding v. Minear*, 54 Cal. 502, and cases cited.) The refusal to permit the amended or supplemental answer was not, upon the facts as they appear in the transcript, an abuse of discretion.

An application for leave to file a supplemental answer, setting forth facts which have occurred since the last continuance, will ordinarily, if made promptly, be allowed almost of course. But the application should be made promptly and as soon as its necessity is ascertained. (2 Wait's Pr. 470.) Here the facts were known to one of defendant's attorneys before the action was called for trial. The application was not made, however, until the day after the jury was impaneled, and after counsel for plaintiff had opened his case to the jury.

In this State an attorney has, perhaps, no lien for his costs. But may not the Court—in deciding, in its discretion, whether a party shall be allowed, pending the trial, to plead a release, executed on a settlement of the cause of action which was made prior to the trial—consider the circumstances that the settlement was made behind the back of the attorney of one of the parties; perhaps in fraud of his rights, certainly when the party was deprived of the supervision and protecting care of his chosen legal adviser? Such settlements ought not to be encouraged, and if they are to be enforced at all, should be enforced only through the medium of a plea proffered at the earliest practicable moment.

Judgment and order affirmed.

[No. 6,879.—Department One.]
March 22, 1882.

A. J. ANGELL v. D. M. DELMAS ET AL.

**APPEAL FROM ORDER—RECORD—TRANSCRIPT—IDENTIFICATION OF PAPERS—
BILL OF EXCEPTIONS.**—Appeal from an order made after a final judgment
dismissed on the ground that there is no bill of exceptions, or any
thing else in the record to show what papers were used on the hearing in
the Court below.

APPEAL from an order made after judgment in the Twenty-
third District Court of the City and County of San Francisco.
THORNTON, J.

The order appealed from was an order vacating a judgment
by default "upon the ground that this Court never had juris-
diction of the person of defendant."

J. B. Hart, for Appellant.

The record shows that the Court below had jurisdiction,
and that the order should be set aside, with costs. (*Jordan*
v. Hubert, 54 Cal. 260; *Dubbers v. Goux, Ad.*, 51 id. 153;
Gregory v. Haynes, 21 id. 443; *Myers v. Moll*, 29 id. 359.)

J. Alexander Yoell, for Respondent.

The COURT:

This case does not come here in a condition to admit of our
considering the point sought to be made by the appellant.
The appeal is from an order made after final judgment, and
there is no bill of exceptions or anything else in the record to
show what papers were used on the hearing in the Court
below.

Appeal dismissed.

1. *Pettres v. Frank*, 66 Cal. 94.

[No. 7,122.—Department One.]
March 22, 1882.

FREDRICK DOHS ET AL. v. MARY L. DOHS ET AL.

ESTATES OF DECEASED PERSONS—FINAL DISTRIBUTION—DEFINITION—PENDENCY OF ADMINISTRATION—CLAIMS AGAINST ESTATE—STATUTE OF LIMITATIONS.—Until the entry of a decree discharging the executor or administrator, the administration of the estate is still pending, and until then (under C. C. P. § 1569) no claim against the estate which has been presented and allowed is effected by the statute of limitations.

APPEAL from a judgment for the defendant Willoughby against the plaintiff and other defendants in the Twenty-third District Court of the City and County of San Francisco. THORNTON, J.

The complaint (filed April 19, 1819), in effect alleges that Fredrick Dohs, John Dohs, Frank Dohs and Anna Walker, and the defendants, Mary L. Dohs and Adelaide Dohs, are the equitable owners as tenants in common of certain land in the City and County of San Francisco, formerly the property of Catharine Dohs deceased; that, by the will of Catharine Dohs, the defendants Jacob Gundlack and Henry Meyer (together with F. Von Loehr) were appointed trustees of said property in trust for the plaintiffs and the two defendants first named; and that in the decree of distribution in the estate of said deceased the said premises, which were part of said estate, were distributed to the said trustees upon the trusts aforesaid; that said Catherine Dohs in her life-time and while the owner of said premises, on or about the first day of December, 1867, executed to one Peter Reitz a mortgage upon said property to secure her promissory note for the sum of two thousand five hundred dollars; which note was payable January 1, 1870; that the said note by mesne assignments has vested in the defendant, Cornelia Willoughby, who claims to be the owner and holder thereof and claims that said mortgage is now a lien on said premises. The prayer of the complaint is that the mortgage claim be adjudged to be barred by the statute of limitations, and for an execution in trust.

1. *Dohs v. Superior Ct.*, 68 Cal. 475.

The Court found in effect that these allegations were true and further found as follows :

That said mortgagee, Peter Reitz, duly presented his mortgage claim against said estate to the executors, and the same was by them duly allowed, and allowed and approved by the Probate Judge of said Court, and on the nineteenth day of January, 1870, the same was duly filed in said Court.

That final distribution of said estate was duly had in the said Probate Court, on the seventh day of February, 1871, and upon the hearing of the petition of executors for said final distribution, said Peter Reitz came into Court and consented that said final distribution of said estate be had "subject to the lien of his claim and mortgage," and the said property was so distributed to said Henry Meyer, Jacob Gundlach and F. von Loehr "in trust, subject to the claim and mortgage of said Peter Reitz, to and for the said children of said deceased," to be held by said trustees until the youngest son should become of age, when said trustees should sell said property, pay all just and valid claims and demands due, and distribute the residue among the beneficiaries.

That said estate was indebted to said executors at the date of said distribution in the sum of eight hundred and fifty-eight dollars and forty-five cents.

That said trustees have paid the interest upon said note and mortgage up to the first day of May, 1879. That there remains unpaid thereon the sum of two thousand five hundred dollars with interest from May 1, 1879, at one per cent. per month.

From the facts found the Court held as conclusions of law: That said property, described in the complaint in this action, was distributed by the Probate Court of the City and County of San Francisco, to F. von Loehr, Henry Meyer and Jacob Gundlach in trust, to pay the note, mortgage and claim of Peter Reitz, and that said mortgage is now lien on said property. That said property should be sold at public auction, and out of the proceeds of sale there shall be paid said note and claim of defendant Willoughby.

Judgment was entered accordingly.

Sawyer & Ball, for Appellants.

The facts are all admitted and the questions to be decided are purely of law. The appellants insist:

1. That by the decree of distribution the *claim* of the mortgages in the Probate Court was amended, and the claim reverted back to its original status of note and mortgage.

2. That no trust was created by the will in favor of the mortgagee.

3. That even if a trust was created it was not such a trust as would prevent the statute of limitations from running against them.

4. That said note and mortgage was barred by the statute of limitations January 1, 1874.

The fact of presentation and allowance of a mortgage debt does not preclude the mortgagee from foreclosing it. (*Willis v. Farley*, 24 Cal. 499; Code of Civil Pro. § 1,500.)

The mortgagee consenting to the distribution merely placed himself in the position that he would have occupied had there been no death of the mortgagor, no presentation or allowance, merely that of a mortgagee. Then, said claim being merely a mortgage debt, there can be no controversy that it is barred by the statute of limitation, unless a trust was created that will take it out of the operation of the statute.

A general direction in a will to pay debts will not stop the running of the statute of limitations. (Story's Eq., § 1521, a, 11 Ed., p. 587.) Nor will a trust be created thereby. (*Agnew v. Fetterman*, 4 Barr., Penn. 56; Hill on Trustees, § 348; *Powell v. Robbins*, 7 Vesey, 209; 2 Perry on Trusts, § 559.)

Under our statute, the mortgagee had his action of foreclosure, and there is a limitation to that action, and here the statute runs. (Code Civil Pro., § 1500; *Willis v. Farley*, 24 Cal. 499.)

It was contended also in the Court below that the decree of distribution made the mortgage debt a trust. The decree could not go beyond the will, and unless the will created the trust, there could not be one created by the decree; and even if, by the terms of the decree, a trust was created, it was to that extent void, as the Probate Court, not being a Court of

equity, but of limited jurisdiction, had no power to create a trust by its decrees. But no trust was created or intended to have been created by the testatrix, and it is simply a matter of the note and mortgage, and the statute of limitations barred the claim.

Daniel Rogers, for Respondent.

Until a decree, discharging an executor or administrator is made by the Court, the estate is still pending. (§ 279, Probate Act; § 1,697, C. C. P.) Until the entry of a decree, discharging the executor, and terminating his trust, "the trust still continues in contemplation of law and the executor remains clothed with the duty and authority of his office." (*McCrea v. Haraszthy*, 51 Cal. 146.)

No lien against any estate shall be affected by the statute of limitations, pending the proceedings for the settlement of such estate. (§ 186, Probate Act; § 1,569, C. C. P.; *Estate of Shroeder*, 46 Cal. 304, 316.)

When Peter Reitz consented "that final distribution of said estate be had, subject to the lien of his said claim and mortgage," he lost no right; certainly not the right to be paid his just and honest claim.

An express trust created by will or deed is exempted from the statute of limitations. (Hill on Trustees, 167, 341; Lewin on Trusts and Trustees, 484; Ang. on Lim., §§ 167-169; *Kane v. Bloodgood et al.*, 7 Johns. Ch. R. 90; *Lyon v. Marclay*, 1 Wat. 271; *Bank of the United States v. Beverly et al.*, 1 How. 135.)

Catherine Dohs by her will recognized this debt of two thousand five hundred dollars, which at the time had not matured, and its payment was one of the purposes for which she devised her estate to her executors as trustees. (Hill on Trustees, 521 *et seq.*; Lewin on Trust, 484.) The trust is an express trust created by will, and at the time this trust was created the debt was not even due; therefore, it could not afterwards be affected by the lapse of time. "It is an admitted rule, that unless debts are already barred by the statute of limitations when the trust is created, they are not afterwards affected by the lapse of time." (Ang. on Lim., § 367.)

The decree of distribution following the will distributed the land to the trustees, "in trust, subject to the claim and mortgage of said Peter Reitz," exempted the debt from the operation of the statute of limitation.

A *cestui que trust* can not set up the statute of limitations against his *co-cestui que trust*. (2 Perry on Trusts, § 863; *Foscue v. Foscue*, 2 Ired. 321.)

Sawyer & Ball, for Appellants in reply.

There is nothing in the Transcript showing whether a discharge was filed or not; but, assuming that there was none, the decree of distribution was made and filed, and the property distributed, and received by the distributees, and taken possession of by them, and the estate is as effectually closed as it could possibly be by a decree of discharge. The certificate of discharge, in this case, is merely a ministerial duty, and its effect in any case is merely a satisfaction of the decree of distribution. (*Estate of Garraud*, 36 Cal. 279.) After decree of distribution, the Probate Court has no jurisdiction of the property distributed, except to compel delivery. (*Wheeler v. Bolton*, 54 Cal., 302.) The mere fact that the note and mortgage has not been paid does not continue proceedings in the estate, as Peter Reitz waived his claim in the Probate Court, when he consented to a distribution subject to his mortgage, and he did lose some rights, for had the real estate been insufficient to pay the note and mortgage, he could have had no judgment for a deficiency against the estate, as it was closed. He had the right and all the rights of a mortgagee, *and no more*, and his claim, as far as the Probate Court was concerned, was completely wiped out, and the statute of limitations commenced to run from the time the decree was entered, viz., February 7, 1871. (Civil Code, § 2822; *Kane v. Bloodgood*, 7 John. Ch.)

McKINSTRY, J.:

Section 1697, of the Code of Civil Procedure, provides: "When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, under the order of the Court,

all the property of the estate to the parties entitled, and performed all the acts lawfully required of him, the Court must make a judgment or decree discharging him from all liability to be incurred thereafter." Until the entry of such a decree "the trust still continues in contemplation of law, and the executor remains clothed with the duty and authority of his office." (*McCrea v. Haraszthy*, 51 Cal. 146, 151.) Until the entry of such a decree the estate is not settled. "No claim against any estate which has been presented and allowed is affected by the statute of limitations, pending the proceedings for the settlement of the estate." (C. C. P., 1569.) This last clause is sweeping, and includes every claim "presented and allowed."

Judgment affirmed.

Ross and McKee, JJ., concurred.

[No. 7,568.—In Bank.]

March 22, 1882.

HARRIET JAY ELIOTT MORSE v. ANNIE E. WRIGHT

ET AL

UNRECORDED DEED—SUBSEQUENT PURCHASER IN GOOD FAITH—RECITAL OF CONSIDERATION IN DEED—EVIDENCE.—M. purchased land, but caused the deed to be taken in the name of J., and the deed was duly recorded. M. took possession, and afterwards at his request the property was conveyed to him by J.; but the deed was not recorded until after the commencement of this action. Afterwards, at the instance of M., J. made a deed to the plaintiff, then a single woman but subsequently the wife of M. This deed recited a consideration of six thousand dollars, and was delivered and recorded after the marriage—the plaintiff having no notice of the former deed; but there was no proof as to the consideration. Afterwards M. sold and conveyed the land to the defendant for the sum of twelve thousand dollars. J. sues to recover the land.

Held: It is apparent that the legal title to the premises is with defendant. It is only subsequent purchasers for a *valuable consideration* who are protected against prior conveyances unrecorded; within which category plaintiff does not come.

ID.—ID.—ID.—ID.—ESTOPPEL.—There is no ground for the operations of the doctrine of estoppel in favor of the plaintiff against the defendant.

APPEAL from a judgment for the defendants, and an order denying a new trial in the Superior Court of Mendocino County. HUDSON, J.:

As stated in the syllabus the deed to the plaintiff from J. recited a consideration of six thousand dollars.

J. E. Foulds and *J. B. Lamar*, for Appellant.

The title of the plaintiff to the demanded premises is good: 1. Because she is a purchaser in good faith, for a valuable consideration. There is no question as to her good faith. This Court says, in its opinion: "It is true that the deed to *Morse* was not of record, and it does not appear that the plaintiff knew anything of it at the time of the delivery of the deed of Jay to her."

Now, as to the testimony and law on this point: The deed from Jay to plaintiff recites as a consideration "the sum of six thousand dollars, lawful money of the United States of America," etc. "A valuable consideration means a pecuniary consideration." (*Clark v. Tray*, 20 Cal. 219.)

The presumption of law is that the recital of the consideration paid in the deed from Jay to plaintiff is true. Of course it is a disputable presumption; but who disputes it? We challenge the whole transcript to show one particle of evidence, direct or indirect, impeaching, or attempting, or tending to impeach the valuable consideration recited in the deed of Jay to plaintiff. (C. C. P., §§ 1961, 1962, 1763, subd. 39, 1615; *Stephens v. Mansfield*, 11 Cal. 363; Woods' Digest, p. 103, Art. 363, § 26; Hittell's Digest, Par. 668, § 26.)

S. W. Holladay, for Respondent.

The subsequent deed is unavailing to plaintiff, she appearing to be not a *bona fide* purchaser for value. (Civil Code, 1107, 1214.)

Ross, J.:

The action is ejectment for a tract of land in Mendocino county. It appears from the record that the land was purchased on the third of November, 1858, by Salmi Morse from

Solada Duarte and husband (the then owners) for the sum of four thousand dollars—the deed being by Morse's direction, executed by the Duartes to one Robert Jay. This deed was duly recorded, and under it Morse took possession of the property. A few days afterward, that is to say, on the seventeenth of November, 1858, at the instance of Morse, Jay executed to him (Morse) a deed of conveyance of the land. This deed was not recorded until after the commencement of the present action. On the twenty-ninth of November, 1875, Morse, in consideration of the sum of twelve thousand dollars paid to him by the defendant, Anna E. Wright, executed to her a deed of conveyance of the land, under which deed defendant entered into possession of the premises as owner thereof, and has so remained ever since. The findings of the Court further show that Morse, from the time of his purchase on the third of November, 1858, until his sale to the defendant on the twenty-ninth of November, 1875, was, by himself and through tenants, in the possession of the land, claiming it as his own, and exercising repeated, open and notorious acts of ownership of it.

From the above facts it is apparent that the legal title to the premises is in the defendant, Anna E. Wright.

But there are other facts in the case and they are these: Some months after the execution of the deed from Jay to Salmi Morse conveying to the latter the demanded premises, that is to say, on the thirtieth of May, 1859, Jay signed and acknowledged as grantor, a quitclaim deed, which was drawn by Salmi Morse, purporting to quitclaim the said premises to Harriet Jay Elliott, who was then in England. This deed was so drawn, signed and acknowledged without the knowledge or request of the grantee, and without any consideration paid therefor. Shortly after this Harriet Jay Elliott came to California from England, pursuant to an engagement with Salmi Morse to marry him, made about a year prior thereto; and they were married at San Francisco, July 9, 1859.

There was no marriage contract between them relative to the demanded premises or to any other property.

Up to the time of the marriage, the deed drawn by Salmi Morse from Robert Jay to Harriet Jay Elliott had not been delivered. The Court below found that it never was delivered. We are inclined to think this finding ought to have been

the other way in view of the evidence; for the plaintiff testified that four or five days after her marriage with Salmi Morse she went to reside upon the land with her husband, when the latter handed her the deed and said: "Here is the paper of this ranch; that is yours." We find nothing in the record contradicting this statement, and it finds support in the fact that the deed was placed on the records of the county July 16th, 1859. For the purpose of our decision, therefore, we will treat the deed from Jay to Harriet Jay Elliott as having been delivered. But what of it? The title to the property was not in Jay when the deed was made. It had been previously conveyed by him to Salmi Morse. It is true that the deed to Morse was not of record, and it does not appear that the plaintiff knew anything of it at the time of the delivery of the deed of Jay to her. But it is also true that, as respects subsequent purchasers, it is only subsequent purchasers for *a valuable consideration*, who are protected against prior conveyances unrecorded, within which category plaintiff does not come.

But it is said that the defendant is estopped from denying that the deed from Jay to plaintiff conveyed to her the title. On what principle we are unable to see. Plaintiff paid nothing for the deed from Jay, which conveyed nothing for the reason, as already stated, that Jay had at the time of making the deed, nothing to convey; while the defendant paid to Salmi Morse the sum of twelve thousand dollars for the legal title to, and the possession of, the premises conveyed and delivered by him to her. We see no ground for the operation of the doctrine of estoppel in favor of the plaintiff as against the defendant.

Judgment and order affirmed.

MYRICK, MCKINISTRY, SHARPSTEIN, and MCKEE, JJ., and MORRISON, C. J., concurred.

[No. 6,586.—In Bank.]

March 22, 1882.

FREDERICK P. HOWARD v. PETER DONAHUE.

MONEY HAD AND RECEIVED—TENANTS IN COMMON—OUTSIDE LANDS OF SAN FRANCISCO—ORDER NUMBER 800.—On June 5, 1861, the defendant, then being the claimant of a certain tract of land called the Donahue Tract, part of the lands known as the outside lands of the City and County of San Francisco, by a bargain and sale, deed conveyed an undivided interest therein equal to ten acres to one B., and also interests to others. After the passage of the Act of Congress of March 6, 1866: "To quiet the title to certain lands within the corporate limits of the City of San Francisco," and the act of the Legislature confirming order 'No. 800' of the Board of Supervisors of San Francisco, the defendant caused the Donahue Tract to be delineated upon the map of the outside lands, and paid all the necessary taxes and assessments; and a part of the tract being taken for Golden Gate Park, and an award made therefor, received the amount of the award from the proper officer of the city—except a portion thereof retained by the officer for the purpose of paying the shares of the vendees of defendant other than B., and executed to the city a deed for the land taken. The names of the other vendees appeared upon the map; but neither B. nor any of his grantees, ever had actual possession of any part of the land, or paid any part of the taxes or assessments, or had any thing to do with the delineation of the claim upon the map. Action by an assignee of B. to recover of the defendant the proportion of the money received by him corresponding to B.'s interest in the land.

Held: It does not appear that D. took upon himself to act for B.; their relationship as tenants in common did not cast upon him that duty; therefore it does not appear that by any agreement express or implied, or by any obligation, the mon^ys received by D. were received in whole or in part for or on account of B. or his interest.

APPEAL from an order of Fifteenth District Court of the City and County of San Francisco granting defendant's motion for a new trial. DWINELLE, J.

By the Act of Congress of March 8, 1866, "To quiet the title to certain lands within the corporate limits of the City of San Francisco," the title of the United States to certain lands was relinquished and granted to the City in trust, that the said lands "should be disposed of and conveyed by said City to parties in the *bona fide* actual possession thereof by themselves or tenants on the passage of this Act in such quantities and upon such terms and conditions as the Legislature of the State of California may prescribe," etc.

Afterwards by an order of the Board of Supervisors of San Francisco entitled "Order No. 800," subsequently ratified by the Act of March 27, 1868, it was provided that a portion of the land referred to in the Act of Congress (known as the "outside lands") should be subdivided and a map thereof made, and that any person having or claiming any interest in any portion of said land might have the same delineated on the said map, provided all taxes should have been paid thereon for five fiscal years preceding July 1, 1866.

It was further provided that the lands reserved for public uses should be appraised, and the appraised value assessed upon the other lands delineated on the map; and that upon the payment to the County Treasurer, of the amount thus assessed, the City and County of San Francisco, by the said order, relinquished and granted its title to the lands in the order described, and not excepted or reserved, and upon which should be paid previous to April 1, 1868, the taxes assessed thereon for the five fiscal years preceding July 1, 1866, "unto the person or to the heirs and assigns of persons, who were on the eighth day of March, 1866, in the actual *bona fide* possession thereof by themselves, or their tenants, or having been ousted from such possession before or since said day, have recovered or may recover the same by legal process," and it was declared to be the intent and object of this provision to pass the title of the city and county in and to every tract and portion of the land delineated in said map, (except portions reserved) "possessed by one person unto the possessor thereof in severalty," and to every separate tract and portion thereof (except portions reserved) "possessed by more than one person, jointly or in common, unto the possessors thereof;" and it was further provided that the Board of Supervisors should "provide by order, for the distribution and payment to those entitled thereto, of the moneys assessed for the cost of reservations * * * and paid to the City and County Treasurer," as previously provided.

Edward J. Pringle, for Appellants.

The fund collected by the assessment on outside lands was the only provision made for the payment of lands taken for public uses; and the appellant, having shown himself entitled

to his proportion of this fund, has a right, in an action for money had and received, to claim it from the respondent, to whom it was wrongfully paid.

In support of this proposition, we have undertaken to establish that the acts done by the respondents, by virtue of which he received the moneys in question, were not necessarily personal acts, but were such as could be performed by another, and in this case must have been done, and were done, for the appellant, and that he is entitled to claim the benefit of them.

When the legislation for "the settlement and quieting of titles to lands in the City and County of San Francisco" was inaugurated, the lawmakers were familiar with the only precedent in that behalf, viz.: the Act "to ascertain and settle the private land claims in the State of California," passed March 3, 1851. The Act was passed for the purpose of determining the validity or invalidity of the different Mexican grants in the State. Under it, by a number of decisions, two well-settled conclusions had been reached.

First—That the only purpose of the Government was to determine the validity or invalidity of the grant, without considering questions between conflicting owners or claimants. (*Castro v. Hendricks*, 23 How. 441; *Estrada v. Murphy*, 19 Cal. 274; *Stark v. Barrett*, 15 id. 262; *Walbridge v. Ellsworth*, 44 id. 355.)

Second—That if the grant is presented by or confirmed to a claimant and who is not justly and equitably entitled to it, he is held as trustee for the true owner, and compelled to convey to him. (*Hardy v. Harbin*, 4 Saw. 540; *Salmon v. Symonds*, 30 Cal. 301; *Wilson v. Castro*, 31 id. 420; *Bludworth v. Lake*, 33 id. 263.) This doctrine reached its natural limit in the case of *Pico v. Spence*, 21 Cal. 511, where the Court refused to hold the defendant as trustee for the plaintiff, because he had presented a different grant from the one claimed by plaintiff.

Such was the well-settled state of the law under the only precedent which the State afforded for "the settlement and quieting of titles to lands." When the same necessity arose in San Francisco, what was the state of facts? The whole region of outside lands was covered with different possessions,

having a recognized individuality, and known by the names of one or more of their owners or claimants. A glance at the News Letter Map of 1864 will show how the region was chequered with claims of different shapes and sizes, and designated by different names of owners: Peter Donahue, Donahue, Cohen and others, Meyer & Seligman, M. Ullman, G. Flint, D. W. Perley, Buckley & Sullivan, etc.

For the purpose of showing the relation which these different claims bore to the lands which were to be reserved for streets and public parks, the outside land map was devised. The first purpose of the map was to divide the whole region into lots and blocks, laying out streets, and exhibiting all the lands to be reserved for public uses. (See §§ 1 and 2 of Order 800.) The next object of the map was to exhibit the different outside land claims. These (by § 4, Order 800) were required to be delineated on the map. All the portions of the different claims which, upon such delineation, came within the lines appropriated to public uses were reserved and became, by the adoption of the map, "absolutely dedicated" to the uses designated on the map. To those portions the title never passed to the claimants, but they became, by the operation of the ordinances under the Act of Congress, "reserved and set apart for public uses." (§ 6.) Yet the equities of the parties were recognized, and provision was made for compensation for the lands reserved for the parks.

Now, it will be seen upon examination of the whole scheme, of which this map was but one feature, that the object of the map was not, as contended by the respondent, to "ascertain and settle" the claimants, but simply to delineate and ascertain the claims. For no names were required to be presented or registered. A map itself is but the proper presentment of claims and not of claimants; of lines and not of titles. No lists were kept of claimants, and yet the different sections of the laws are full of reference to undivided interests, and co-tenants, full of reference to the fact that the claimants will necessarily greatly outnumber the claims delineated. Delineation was to be made by the Committee of the Board. Invitation was given to present a description of the claims during the progress of the preparation of the map, and during thirty days of exhibition after its completion. And yet no

provision is made for changes of claimants during this period.

In the other part of the general scheme, where provision is made for the issuance of deeds to claimants, a notable difference appears. A petition is required to be presented by the claimant, and proofs made by him; an award is made to him, and the award is published for three weeks; and only in case that no opposition is made is a deed issued. These petitions and the proceedings thereon are the true inquest to "ascertain and settle" the titles of claimants, and in these proceedings the delineation of the claim on the map by the claimant is not a condition of the issuance of a deed to him. The reason would very naturally seem to be that the claim, having been once for public purposes delineated on the map, it would be absurd and impossible for each claimant of any interest therein to be required to repeat the delineation.

Such were the two features of the general scheme—a map for the purpose of defining the lands reserved for public uses, a petition, with appropriate proofs, for the purpose of conferring title by deed to the lands not reserved.

Compensation for the lands taken for public uses was to be made, not by a general claim against the city or against the Tax Collector, but by "*distribution and payment*," to the parties entitled, of moneys assessed for that purpose upon the outside lands, (§ 16, Order 800.) The only direct condition for this payment to the person entitled was that his claim should have been delineated on the map, (§ 8.) Section 4 has added indirectly another condition, by providing that "no claim shall be delineated on the map unless all taxes shall have been paid thereon for five fiscal years preceding the year beginning July 1, 1866."

Donahue, being the owner of one of these claims, containing two hundred and ninety-six acres, conveyed an undivided interest of five acres, by deed of grant, bargain, and sale, to Butters, plaintiff's grantor. He made also other deeds of undivided interests. After such conveyance he caused the claim to be delineated on the map, paying, of course, for that purpose the taxes for five years preceding July 1, 1866. He is asked: "You had no intention, as far as you were aware of, of repudiating the

claim of Mr. Butters?" Ans.—"No, sir." "When you put this Donahue claim on the map, did you intend to repudiate the deed you had made to Butters?" Ans.—"No, sir; I did not intend to repudiate that, or others which I had made, also."

Under this state of facts, without, and *a fortiori* with, this admission of Donahue, the plaintiff comes within the general equities of the Act of Congress and the ordinances.

The possession of Donahue is his possession, both by operation of law, no ouster being pretended, and by this distinct recognition of his deed by Donahue. It is unnecessary to elaborate this point. The presumption in favor of the plaintiff arising from the relation of tenancy in common is not only not overturned, but is strengthened into proof.

The plaintiff therefore is entitled to his proportion of the moneys collected for, and appropriated to compensation for lands devoted to public uses, unless the delineation of the claim on the map, or the payment of taxes be a personal act, which could be done only by himself.

The respondent's counsel contends—and it is the chief point of his argument—that they were adversary acts, performed by Donahue in repudiation of his deed; and hence he is under no allegiance to the plaintiff. But this, as we have seen, Donahue himself denies. The counsel who now argues the case did not try it below, and has not caught the spirit of the trial. An examination of the transcript and of Donahue's evidence (as well what he said as what he forbore to say) will show that personally his whole defense was that he had not received the money corresponding to the Butter's interest; and the great contest in the case was over that point, which was decided in favor of the plaintiff. For the Court below found all the facts in favor of the plaintiff, granting a new trial solely on the ground that the plaintiff had not delineated his claim on the map or paid the taxes.

We submit, therefore, that, under the evidence and findings of the Court, the delineation on the map and the payment of taxes were made by Donahue, recognizing and acknowledging the rights of his vendee and co-tenant, who is thereby entitled to claim the benefit of those acts.

This proof, it will be seen, goes far beyond the necessities

of the case. For the plaintiff's case is really made out by showing that Donahue stood in such a relation to him that the acts of Donahue enured to his benefit, unless and until Donahue expressly repudiated the deed and the trust that grew out of it.

After the execution of the deed, Donahue sustained the double relation of vendor and tenant in common with the plaintiff; and any acts of delineation on the map and payment of taxes done by him in furtherance of the common title would be for the benefit of the co-tenant. (*Chickering v. Faile*, 38 Ill. 345.)

All the equities are in favor of the plaintiff. The defendant got his purchase money at first and then got the compensation money from Austin. It is immaterial by what euphonism we may characterize the position in which the defendant is placed, if he received the moneys appropriated as compensation for the land which he had sold. If the plaintiff was entitled to receive this money from Austin, he may recover it from the defendant.

But it is not open to the defendant to inquire whether the plaintiff can make out a case against the city or not. He is estopped from denying the plaintiff's right.

Respondent, by his deed to the city, surrenders to the city the whole tract included within the park, and obtains from Austin the moneys apportioned thereto, although he had conveyed an interest in said lands to the plaintiff. Of course, this money is paid to him by Austin only because he represented the entire tract. If he had told Austin that he had sold a portion to the plaintiff, Austin would never have paid him plaintiff's share of the money, except under the statement made by him at the trial, that he did not intend to repudiate any of the deeds that he had made. Hence, in law as in fact, he received this portion of the money under the plaintiff's right, or claim of right, and he can not now deny it.

It is well settled that where one co-tenant of a chattel sells the whole chattel and gets the purchase money the other may waive the tort and sue for his share of the money. (*Russell v. Russell*, 62 Ala. 48; *Delaney v. Root*, 99 Mass. 547; *Dyckman v. Valiente*, 42 N. Y. 560; *Field v. Bland*, 10 Rep. 116.)

And if such a sale be made of land, the other may still ratify the sale and get his purchase money. Can the vendor in such cases, who has got the purchase money for the property delivered by him, deny the title of his co-tenant? (*Towne v. Kellogg*, 49 Mo. 118.)

McAllister & Bergin, for Respondent.

Title to real estate can not be litigated in a personal action. (*Harlan v. Harlan*, 15 Penn. St. 513; *Halleck v. Mixer*, 16 Cal. 579; *Page v. Fowler*, 28 id. 610; *Kimball v. Lohmas*, 31 id. 157; *Page v. Fowler*, 39 id. 415.) In order to entitle appellant to recover, if the question of title could be litigated in this action, he was bound to show that he was in a position to charge respondent as trustee of the legal title; that is, that by compliance with the provisions of the statute, he had acquired the necessary status to enable him to challenge the holder of the legal title. (*Burrell v. Haw*, 40 Cal. 377; S. C., 48 id. 223; *Sacramento Savings Bank v. Hynes*, 50 id. 202.)

Appellant does not show that he was in possession at the date of the passage of the Act of Congress, on March 8, 1866; that he ever had his claim delineated on the outside land map; that he ever paid the taxes or the outside land assessment, (*Dupond v. Barstow*, 45 Cal. 452-454; *Clark v. San Francisco*, 53 id. 310; *McCreery v. Sawyer*, 52 id. 261.) The moneys received by respondent were by him received to his own use, and no action will lie against him therefor. (*Butterworth v. Gould*, 41 N. Y. 455; *Patrick v. Melcalfe*, 37 id. 332; *Sargent v. Stryker*, 1 Harr. (N. J.) 464; *Munsell v. Lewis*, 4 Hill, 638.)

The fourth section of Order 800 provides, that "any person having or claiming any interest in any portion of said lands under, or by virtue of any of the provisions of this order, may upon the completion of the map, or while the same shall remain in the office of the Clerk of the Board of Supervisors for public inspection, present to the committee on outside lands, a description and diagram of the lands in which he shall so claim an interest, and have the same delineated on said map, but no claim shall be delineated upon said map by said committee, unless all taxes shall have been paid thereon for five fiscal years preceding the year beginning July 1, 1866."

The language of this section would not seem to be open to doubt; it applies to any person having any interest in any portion of these lands, and it applies to any person claiming any portion of these lands. It can scarcely be conceived that any others could have any interests in these lands than those having an interest in them, or those claiming to have an interest in them. The language would seem to be sufficiently comprehensive to include persons of all descriptions who might have or claim any interest in them. What were these persons to do in order to secure the benefit of title under the ordinance? All of these persons, not any one, but all these persons were required to present to the committee of outside lands, what? First, a description, and second, a diagram of the lands in which he shall so claim an interest and have the same delineated on said map.

These are two distinct requirements exacted of all persons who would avail themselves of the benefit of the ordinance, of all persons having any interest in the lands, and of all persons claiming any interest in the lands. But there was a still further condition, and that was, that no claim shall be delineated upon said map by said committee, unless all taxes shall have been paid thereon for the five fiscal years, and so forth.

The Court will observe that the condition is that all taxes upon the claim shall be paid: not that all taxes shall be paid by any individual on any particular interest, whether in severalty, in common, or held jointly. All taxes on the claim must be paid. As to what is a claim, vide *Marshall v. Shafter*, 32 Cal. 191; *Henley v. Hotelling*, 41 id. 21. Sections 5, 6, and 7 are not material.

Thus far the Court will observe that the conditions to the securing of title, under the provisions of the ordinance are, first, presentation of a description and diagram to the committee on outside lands; second, to have the lands in which an interest is claimed, delineated upon the map; third, that all taxes on the claim, etc., be paid.

Section 8 provides that no person shall be entitled to receive any compensation for any lot or parcel of land, set apart for public use, unless his claim shall have been delineated upon the map.

These, however, are not all the conditions compliance with which is necessary in order to secure title. Under Section 10 the Committee on Outside Lands are to make a just appraisal of the lands reserved for public uses, and to make a just and equitable assessment of the value of the lands so reserved, ratably and equitably upon, and to each piece and parcel of land delineated on said map according to the appraised value of said lands.

Section 11 is the one containing the grant. The city, under that section, cedes the title upon what conditions? First, upon the payment to the County Treasurer, of the amount assessed thereon by the Outside Land Committee; second, the payment of taxes, etc.; third, that the persons who were on the eighth of March, 1866, in the actual *bona fide* possession thereof by themselves or tenants, or having been ousted from such possession before or since said day, have recovered, or may recover the same by legal process. (Statutes of 1867 and 1868, p. 379.)

To recapitulate, therefore, under Order 800, the party who would claim title to any of the lands thereunder, must show first that on March 8, 1866, he was in the actual *bona fide* possession of the lands by himself or tenants, or having been ousted from such possession, has recovered, or may recover the same by legal process; second, presentation to the Committee on Outside Lands of a description and diagram of the lands in which he claims an interest; third, have the same delineated on the map; fourth, show that all taxes for the five fiscal years preceding July 1, 1866, on the claim were paid; fifth, show payment of assessment on such lands for the lands appropriated to public use. The purpose of these requirements is as obvious as the language of the statute is express. It was to ascertain, settle, and expedite the settlement of title to lands in the City of San Francisco, and such has been the uniform spirit in which the Court has heretofore construed the provisions of this Act.

In regard to the first of the conditions as we have thus recapitulated them, this Court in *Pickett v. Hastings*, 47 Cal. 285, construing a similar provision in the Van Ness Ordinance, say:

"The question as to whether he is entitled to the benefits of the ordinance, depends upon the construction to be given to the language of the ordinance, 'may be recovered by legal process.' By the words 'legal process' is meant an action brought in a Court of competent jurisdiction. The only difficult matter for construction is the words 'may be recovered,' and the question arising upon those words, is whether they import a right of recovery only, or a recovery in fact. That is to say, whether the Van Ness Ordinance title devolved upon the person who then possessed the right of recovery, as against an intruder or trespasser, or whether it vests in the person who, in fact, recovers the possession from such intruder or trespasser. We are of opinion that those words mean, when read with the other words of the section, 'shall be recovered.' The purpose of the ordinance as we construe it was to give the Van Ness Ordinance title to those who had already recovered the possession from an intruder or trespasser, and to those who should thereafter recover the possession from an intruder or trespasser. * * If this be the proper construction of the ordinance, the Van Ness Ordinance title has not vested in the plaintiff, and of course, he cannot rely on it for a recovery in this action. The ordinance declares in effect, that a person included in the fourth class, who shall recover the possession of the lands from which he was ousted, shall have the Van Ness Ordinance title, but does not declare, nor can it be inferred therefrom, that he shall receive that title, not only as the fruits, but also for the purpose of such a recovery." (*McManus v. O'Sullivan*, 48 Cal. 18.)

In *Dupont v. Barstow*, 45 Cal. 452, the Court enforced the necessity for the payment of the taxes and the assessment.

In *Clark v. San Francisco*, 53 Cal. 310, the Court held that the party failing to have his claim delineated on the map, and failing to pay taxes and assessments, had no claim therein, as against the city.

In placing a proper construction upon this Ordinance, and the Act of the Legislature confirming it, it should be borne in mind that parties who would claim their benefit, had no title to the land. It is not a case where an existing title is made subject to statutory regulations provided in the public

interest, but it is the case where title can only come through compliance with the provisions of the statute itself.

Having no title in absence of compliance with the statute, none can be asserted in absence of compliance with its provisions. In this case the title to the land was primarily in the United States, and subsequently ceded to the city in trust for the uses and purposes expressed in the Act of Congress.

The benefit to be derived by complying with the terms of the ordinance and statute was not one to be forced upon him. It was one that it was his privilege to accept or reject. Under the provisions of the law he was required to manifest such acceptance or rejection at the time and in the manner prescribed, and having once done so expressly or by his silence, he is bound thereby. (*Damrell v. Meyer*, 40 Cal. 170.)

So we respectfully submit there is no law which will enable the appellant at this late day to reap the fruits of the superior diligence of the respondent. (*Marquez v. Frisbie*, 11 Otto, 476; *Vance v. Burbank*, 11 id. 570; *Sheaby v. True*, 45 Cal. 240; *Brown v. Brackett*, 21 Wall. 388; *Pico v. Spence*, 21 Cal. 511.)

The duty of ascertaining who were beneficiaries under the Act of Congress and the statutes was vested in the city authorities, and in the absence of fraud their determination is final and conclusive. (*French v. Ryan*, 93 U. S. R. 171; *Wilcox v. Jackson*, 13 Pet. 511.)

The only principle upon which it can be claimed that any one other than the grantee of the city can assert any title or interest in lands or moneys the titles to which were acquired under the ordinance and the statute, is upon the theory of actual or constructive fraud or trust. We presume it will hardly be claimed that it was any fraud on the part of the respondent to comply with the provisions of the statute, and it will hardly be claimed that the record shows any actual fraud. The law will never allow a constructive trust or fraud to arise, whereby its provisions or its policy will be frustrated. Thus, no trust will result in favor of a person advancing the purchase money of a ship registered in the name of any other, for the register, according to the policy of the law, is conclusive evidence of ownership, both at law and in equity. (*Ex parte Gallop*, 15 Vesey, 68; *Ex parte Stoughton*, 17 id. 251; *Slater v. Willis*, 1 Bevan, 354.)

In any view, therefore, that may be taken of the matter, whether upon the letter of the statute, the policy of the statute, or the principles of the general law, we submit that the appellant shows no title to any of the lands, or the proceeds of any of the lands mentioned in the record in this case.

MYRICK, J.:

This is an action for money had and received, and proceeds upon the theory that the defendant has in his possession money which belongs to the plaintiff.

The controversy grows out of the facts that on June 5, 1861, the defendant, then the claimant of a certain tract of land called the Donahue tract, containing 296 acres of what are known as the outside lands of the city and county of San Francisco, conveyed by deed of grant, bargain and sale to one Butters, an undivided interest therein equal to ten acres. The defendant also conveyed some other interest in the tract to other individuals. After the passage of the Act of Congress of March 8, 1866, relating to the outside lands, and the appropriate State legislation, Donahue caused the Donahue tract to be delineated upon the map of the outside lands, and paid all the necessary taxes and assessments. Afterwards a part of this tract was taken for Golden Gate Park, and an award made for the part so taken. Donahue demanded the amount of the award, and received from the proper officer a part of it, on the receipt of which he executed to the city a deed for all that part of the Donahue tract taken for the park. The amount retained by the officer—some twenty thousand dollars or twenty-two thousand dollars—was retained by him for the purpose of paying the shares of the vendees of Donahue other than Butters. The names of those other vendees appeared on the map. Butters' name did not, and the officer knowing nothing of any claim on his part, paid, as is contended by the plaintiff, the portion of the award corresponding to the Butters' interest, to the defendant. Neither Butters nor any of his grantees, appear ever to have had actual possession of any part of the land, nor to have paid any part of the taxes or assessments, nor to have had anything to do with the delineation of the claim upon the map. The first that seems to have been heard of that interest since the defendant's

deed in 1861, was the demand made on the defendant shortly before the commencement of this action, by the plaintiff, who had, by mense conveyances, succeeded to one half of Butters' rights, for that portion of the award corresponding to the interest held by him.

While it is not pretended on the part of the plaintiff that Butters or any of his grantees ever, personally, complied with any of the requirements of the legislation relating to the outside lands, yet it is contended that by reason of the relation existing between them and the grantor, defendant, the compliance by the latter with those requirements, made, as it is claimed, in furtherance of their common title, inured to the benefit of his vendees.

We cannot accede to that proposition. Order No. 800 required action upon the part of each and every person "having or claiming any interest in any portion" of the lands; such action was required to be had by himself or some one for and on his behalf. For the *purposes of such action*, the relation of tenants in common did not exist; that relationship may have existed in the ownership of the lands, but in seeking the compensation provided for in the order, each was to act for himself. It does not appear that Donahue took upon himself to act for plaintiff; their relationship, as tenants in common, did not cast upon him that duty; therefore it does not appear that by any agreement, express or implied, or by any obligation, the moneys received by Donahue were received, in whole or in part, for or on account of plaintiff or his interest. It does not appear that the plaintiff had by his acts placed himself in such a position as that he could have demanded of the city and county or its officers any payment for his interest in the lands. If so—if the city and county, in consequence of his omission, was under no obligation to make compensation to him—how can Donahue be held to have received to the use of plaintiff a portion of the moneys claimed and received from the city and county for his own interests on his individual application?

Order affirmed.

McKEE, J., and MORRISON, C. J., and SHARPSTEIN, THORNTON, McKINSTRY, and ROSS, JJ., concurred.

[No. 8,216.—Department Two.]
March 22, 1882.

M. M. SPEEGLE v. J. G. JOY.

FEES OF RECORDER OF MONTEREY COUNTY—STATUTES—CONSTITUTIONAL LAW.—"An Act in relation to the County Officers of Monterey County" was passed on March 30, 1878; but so far as the salary of the Recorder was concerned was by its provisions to go into effect on the first Monday in March, 1880.

Held: The provisions relating to the salary of the Recorder never went into effect. (Cons. Art. i.)

APPLICATION for writ of mandamus.

S. M. Swinnerton, for Plaintiff.

N. A. Dorn, for Defendant.

The COURT:

The plaintiff is the Recorder and the defendant the Auditor of Monterey County. Plaintiff claims that there is due him the sum of one hundred and sixty-six dollars, one month's salary as such Recorder, and that it is the duty of the defendant, as Auditor, to draw his warrant in favor of the plaintiff for that amount; that demand has been made for such warrant, and defendant has refused to draw it. This is an application for a writ of mandamus.

It is conceded that the writ should issue if the Act of March 30, 1878 (Laws of 1877-78. p. 863), is in force. That Act, so far as the salary of the Recorder of Monterey County is concerned, was by its provisions to go into effect on the first Monday of March, 1880. In the case of *Peachy v. The Board of Supervisors of Calaveras County*, 8 Pac. C. L. J. 813, this Department held that such an Act as the one now before us never did go into effect, as Section 1, Article xxii, of the new Constitution went into effect on the first day of January, 1880, and provided that "all laws in force at the adoption of this Constitution not inconsistent therewith shall remain in full force and effect until altered or repealed by the Legislature."

It was the Act in force at that date that was kept in existence, and the Act that was, by its terms, to go into effect at a future day, was defeated.

Writ denied.

1. *Co. of Los Angeles v. Lamb*, 61 Cal. 198; *People v. Whitting*, 64 Cal. 68.

[No. 8,037.—Department Two.]

March 23, 1882.

PEOPLE v. A. M. CRANE, JUDGE, ETC.

BILL OF EXCEPTIONS—MISTAKE IN NAMING—STATEMENT—PRACTICE.—After judgment for the defendant, the plaintiff prepared and served a document, containing the essential requisites of a bill of exceptions, but entitled "plaintiff's proposed statement on appeal;" and the Court refused to settle the same.

Held: A mistake in entitling a bill of exceptions is not a sufficient ground for refusing to settle it.

ID.—ID.—ID.—There is no difference between a statement and a bill of exceptions in form or substance, except that the former follows a notice of of motion for a new trial.

APPLICATION for writ of mandamus to A. M. Crane, Superior Judge of Alameda County.

W. H. Allen, for Plaintiff.

Vrooman & Hall, for Respondent.

The COURT:

The Code makes no provision for the settlement of a "statement on appeal." It provides for the settlement of "a statement of the case." But that can not be settled until after a notice of a motion for a new trial has been served. Such statement, when settled, may be used on the motion for a new trial, and afterwards on an appeal, if one be taken, from the judgment. (C. C. P., 950.)

The relator did not serve a notice of motion for a new trial, and therefore is not entitled to have "a statement of the case," to be used on a motion for a new trial settled. And it appears that he did not prepare "a statement of the case" for that purpose. But he did prepare something which he entitled "Plaintiff's proposed statement on appeal," for which the Code makes no provision. And for that reason the respondent, as Judge of the Superior Court in which the original action was tried, refused to settle it. The objection, however, as we view it, is rather to the form than to the substance of the thing. If it had been entitled "Plaintiff's bill of exceptions," we think it clearly would have been the duty of the

Court to settle it. The exception appears to be the decision, upon the ground of the insufficiency of the evidence to justify it, and the objection specifies the particulars in which such evidence is alleged to be insufficient. Whether more of the evidence is stated with the objection than is necessary to explain it, is a question which must be determined by the Judge when he settles it. If more than is necessary for that purpose has been inserted, it is his duty to strike out so much as is unnecessary. But we do not think that a mistake in entitling a bill of exceptions is a sufficient ground for refusing to settle it. In *People v. Lee*, 14 Cal. 510, this Court held that there was no difference between a statement and bill of exceptions. In this State there certainly is not in form or substance. But the Code makes a distinction, by providing that one may be settled within a certain time after the entry of the judgment and the other within a specified time after the service of a notice of motion for a new trial. In this case the exception with so much of the evidence as the relator claims is necessary to explain the objection, was presented to the Judge for settlement within the time prescribed by the Code for the presentation of a bill of exceptions, and we think that it should have been treated as such notwithstanding the mistake in entitling it.

Let a peremptory writ issue as prayed.

[No. 7,320.—In Bank.]

March 23, 1882.

JAMES T. BOYD ET AL. v. CUTHBERT BURREL ET AL.

APPEAL—FILING OF THE UNDERTAKING.—The notice of appeal was served upon the attorneys of the adverse parties on the eighteenth day of December, 1879, and (according to the endorsement of filing appearing in the transcript) filed with the undertaking, January 30, 1880.

Held: The undertaking not having been filed within five days after service of the notice the appeal must be dismissed.

ID.—ID.—CORRECTION OF RECORD—CLERK.—Affidavits were filed to the effect that the notice and undertaking came to the hands of the Clerk on December 21st, and counter affidavits to the effect that the same were not filed by the Clerk until January 30th, on account of the non-payment of the fees in advance, and that appellants were notified by the Clerk at the

time of receiving the papers that the same would not be filed until the fee was paid.

Held: The record of the Court below cannot be altered or amended by proof made in this Court; if it is incorrect, that must be made to appear by proper evidence to the Court below, which has power to alter it so as to make it speak the truth. It would be a departure from all principle to allow a record sent to this Court to be assailed by evidence of less dignity than a record.

Held, further: The clerk was justified in refusing to file the notice and undertaking until his fee was paid.

Id.—Id.—Id.—CASE DISTINGUISHED.—*Tregambo v. Comanche M. & M. Co.*, 57 Cal. 501, distinguished.

APPEAL from an order denying the plaintiff's motion for a new trial in the Thirteenth District Court in and for the County of Fresno. CAMPBELL, J.

P. G. Galpin, for Appellants.

In *Tregambo et al., Respondents, v. Comanche Mill & Mining Company, Appellants*, 57 Cal. 505 (June 25, 1881), it was held that "when the demurrers were brought and deposited with the Clerk for filing they were in contemplation of law, as to the defendant on file in the case." (*Engleman v. State*, 2 Ind. 91; *Bishop v. Coon*, 13 Barb. 325; *Lawson v. Falls*, 6 Ind. 309. The undertaking was filed within five days after service of the notice of appeal within the meaning of § 950, C. C. P.

Stetson & Houghton and McAllister & Bergin, for Respondents.

No appeal has been taken in this case. (C. C. P. § 940. *Reed v. Kimball*, 52 Cal. 325; *Hastings v. Halleck*, 10 id. 31; *Estell v. Chapman*, 15 id. 283.)

McKINSTRY, J.:

This appeal must be dismissed. The notice of appeal was served upon the attorneys of the adverse parties December 18, 1879; the undertaking on appeal was filed January 30, 1880.

Section 940 of the Code of Civil Procedure declares that an appeal shall be of no avail unless the undertaking shall be filed within five days after service of notice.

The notice of appeal was filed January 30, 1880. But the

filing with the Clerk of the notice of appeal and its service upon the adverse party are not parts of a continuous act, which, as a whole, constitutes the service of the notice of appeal. Throughout the Code of Civil Procedure papers are said to be *filed* with the Clerk, *served* on opposite parties; and the terms are placed in opposition in the very section which provides for notice of appeal. (§ 940.) Within a limited time after the undertaking on appeal is filed the adverse party may except to the sufficiency of the sureties. (Code Civ. Proc., 948.) It is clearly intended that the adverse party shall not be compelled to watch the Clerk's office for the filing of an undertaking more than five days after he has notice of the filing of the notice of appeal. The phrase "the order of service is immaterial" is the equivalent of "whether the service precede or follow the filing of the notice is immaterial." Thus construed, the distinction between "filing" and "service," already asserted in the previous portion of the same section, is maintained. Its correctness is rendered apparent by a review of the legislation with respect to notices of appeal. Under the Practice Act of 1851, an appeal was made by filing with the Clerk a notice, etc., "and serving a copy of the notice upon the adverse party or his attorney." (§ 337.) While that Act was in operation it was repeatedly held that the filing must precede or be contemporaneous with the service. (*Buffandeau v. Edmondson*, 24 Cal. 94.) Originally the Code of Civil Procedure provided that the undertaking should be filed at the same time with the notice of appeal. The time or order of the service was not expressly declared, but as the service was of a *copy*, it was assumed by the Court that the notice should be first filed, or filed on the same day with the service.

The amendment of 1880, has made it immaterial that the notice is filed after it is served; but still provides that, "an appeal shall be ineffectual for any purpose, unless, within five days after *service* of the notice of appeal, an undertaking shall be filed," etc. In this case the undertaking was not filed within five days and the appeal is "ineffectual."

It is said, however, that the notice of appeal was in fact filed on the *twenty-first of December*, 1879. It was sent by express to the Clerk of the District Court and reached his

hands on the day last mentioned, which was within five days after the notice of appeal was served. The notice was indorsed as filed by the Clerk on the thirtieth day of January, 1880, and on that day was placed by him with the papers and records in his official custody. Admitting (solely for the purposes of this case) that we are authorized to go behind the Clerk's certificate, as the same appears in the record here, the Clerk was justified in refusing to file the notice until his fee was paid. The affidavits show plaintiffs to have been indebted to the Clerk for services previously rendered in the action, and the attorney for plaintiffs had been distinctly notified by the Clerk that no further official services would be by him performed in the action unless his fee therefor was paid in advance. Further, that the Clerk, upon receipt of the notice, immediately informed the attorney that the same would not be filed except on payment of his fee. The law gave to the Clerk the right to refuse to perform any particular service except upon the condition that his fees therefor should be paid in advance. Plaintiffs and appellants cannot claim that he performed an official act, by legal construction, which he in fact refused to perform, having the legal right so to refuse. Having been notified that prepayment would be required, the plaintiffs were not in a position, prior to the payment of his fee therefor, to compel the Clerk either to file the notice of appeal, or to certify that it has been filed.

Tregumbo v. Comanche Co. (57 Cal. 501) was not like this case. There an application was made to the Court below to set aside a default entered against a defendant through his "surprise or excusable neglect." The Clerk did not demand his fees for filing certain demurrers before receiving them, and the fees were tendered before the default was entered. Appeal dismissed.

ROSS, SHARPSTEIN, MYRICK, THORNTON, and MCKEE, JJ., concurred.

THE COURT:

In denying a rehearing in this cause, we think it proper to say that the transcript shows that the notice of appeal was served on the eighteenth of December, 1879, and filed on the

thirtieth of January, 1880. An attempt is made to show by affidavit before this Court, that it was filed at an earlier day, and within the time allowed by law. This cannot be allowed. It was so held in *Boston v. Haynes*, 31 Cal. 107. The record of the Court below cannot be altered or amended by proof made in this Court. If it is incorrect, that must be made to appear by proper evidence to the Court below, which has power to alter it so as to make it speak the truth. It would be a departure from all principle to allow a record sent to this Court to be assailed by evidence of less dignity than a record. (See *Smith v. Brannan*, 13 Cal. 107; *Bonds v. Hickman*, 29 id. 460; *Satterlee v. Bliss*, 36 id. 521.) The party must seek relief in the Court from which his appeal was prosecuted.

Hearing denied.

[No. 6,111.—Department Two.]

March 23, 1882.

HUGH HUGHES v. WATSON A. BRAY.

WARRANTY—SALE BY SAMPLE.—Where goods are sold by sample the law implies a warranty that the article shall not be inferior in quality to the sample; and if they are, the purchaser may accept them, and bring an action for the breach of warranty.

ID.—ID.—MEASURE OF DAMAGES.—In an action for breach of warranty of the quality of barley sold by defendant to the plaintiff, the Court instructed the jury in effect that the measure of damages was the difference between the market value of the barley actually delivered, and the market value of an equal quantity of barley of the same quality as the sample *at the time of delivery*.

Held: The charge was in accordance with the rule contained in Section 3313, Civil Code.

ID.—ID.—CUSTOM—USAGE.—The defendant offered to prove the existence of a general custom and usage among the grain dealers in San Francisco that sales of grain by sample are not considered complete until the buyer has actually inspected and accepted the grain sold. *Held:* The evidence was properly rejected.

APPEAL from a judgment for the plaintiff and from an order denying a new trial in the Nineteenth District Court of the City and County of San Francisco. WHEELER, J.

On the trial, the defendant offered to show the usage and custom among grain merchants in San Francisco in selling grain, and that by such custom and usage, the sale is not deemed to be complete until the vendee has an opportunity to, and does, examine the grain sold, and if satisfied, delivery and payment is then made, and the sale is not complete until then.

Plaintiff objected thereto and the Court sustained the objection, to which defendant excepted.

The Court refused to give the following instructions asked by the defendant:

First—If the jury believe, from the evidence, that the defendant understood that he sold the barley to Robert Watt, and not to Hughes, then the plaintiff cannot recover, although he was the real purchaser in the transaction.

Second—If the jury believe, from the evidence, that plaintiff had an opportunity to, and did examine the barley before or at the time of the delivery, and if, after such examination, he received the same, then plaintiff cannot recover.

Third—The plaintiff is in no case entitled to a larger sum than a sum equal to the difference between the price of feed barley and the price of good brewing barley, on or about the thirteenth day of November, 1874, being the day when the contract was made.

The Court instructed the jury as follows:

"The only remaining question is as to the amount of damages which should be awarded to him. Upon this point, you are instructed that in the first place you should ascertain as nearly as possible from the testimony, what portion of the barley delivered, if any, was of an inferior quality, and in the second place you should award to the plaintiff the difference between the market value of such portion, and the market value of an equal quantity of barley of the same quality as the sample at the time of delivery."

A petition for hearing in bank was filed in this case after judgment and denied.

E. B. & J. W. Mastick and W. C. Belcher, for Appellant.

Cited *Moore v. McKinley*, 5 Cal. 467; Story on Sales, § 376; Benjamin on Sales, § 621; Parsons on Sales, § 547.

When the purchaser examines the article to be sold for

himself, the rule of *caveat emptor* applies and admits of no exception by implied warranty of quality. (Benjamin on Sales, § 644, 649, and n. 648; *Parkinson v. Lee*, 2 East, 314; *Chanter v. Hopkins*, 4 M. & W. 64; *Beirne v. Dord*, 1 Seld. 95; *Bradford v. Manly*, 13 Mass. 139; *Barnard v. Kellogg*, 10 Wall, 383; *Salisbury v. Steiner*, 19 Wend. 158.)

If there was a general custom or usage in that city in regard to sales of grain, by sample, it became a part of the contract of sale in the absence of express stipulation, and it was competent for the defendant to prove it. (*Stewart v. Scudder*, 4 Zab. 96; *Barton v. McKelway*, 2 Zab. 165; *Barnard v. Kellogg*, 10 Wall. 383; *Beirne v. Dord*, 1 Seld. 95; *Hinton v. Locke*, 5 Hill, 437; Story on Sales, § 376; Benjamin on Sales, § 798; Parsons on Contracts, 535; *Robinson v. The U. S.*, 13 Wall. 363; *Field v. Lelean*, 6 H. & N. 617; *Clark v. Baker*, 11 Met. 186.)

Henry E. Highton, for Respondent.

The sale was made directly and clearly by sample, exhibited at a place where the bulk of the commodity was not present. Both at the common law and under the Code it was a sale by sample in the strictest sense. (C. C. § 1766; Benjamin on Sales, (Second American Ed.) § 648 and note z, 649 and note d, 650, 651, pp. 599-606; *Polhemus v. Heiman*, 45 Cal. 578, 579.)

The contract between the parties, and the warranty resulting therefrom, could not be varied by proof of any custom or usage among grain dealers in San Francisco. The proposal of the appellant was to prove an usage in the very teeth of his own agreement.

The fact that long after having purchased by sample, the respondent examined the hundred and ten tons of barley and received them, to no extent affects his right of recovery, even apart from the special circumstances disclosed by his testimony. He was perfectly authorized to rely upon the contract and warranty, and, when the breach was ascertained, to refuse to accept the barley, or to receive it and recover the damages he had suffered. (Benjamin on Sales (second American edition), § 894, p. 832; *Polhemus v. Heiman*, 45 Cal. 579, 580.)

The COURT:

The exception upon which the appellant seems mainly to rely is to that portion of the charge in which the Court in effect told the jury: That where goods are sold by sample the law implies a warranty that the articles shall not be inferior in quality to the sample, and that if they are the purchaser may accept them and bring an action for the breach of warranty. Such we understand to be the law. (*Polhemus v Heiman*, 45 Cal. 573.)

The charge as to the measure of damages was in accordance with the rule contained in the Code. (C. C. 3313). Evidence of what the usage or custom in San Francisco was as to sales by sample, was properly rejected. (*Polhemus v. Heiman*, 50 Cal. 438, 441).

The instructions asked by the defendant contradicted those given and excepted to, and there was no error in refusing to give them.

There was some conflict in the evidence upon the main issue, and it appears to have been fairly submitted to the jury.

Judgment and order affirmed.

[No. 8,235.—Department Two.]
March 24, 1882.

MYERS v. THE BOARD OF SUPERVISORS OF
ALAMEDA COUNTY.

SUPERVISORS—VACANCY IN OFFICE—POWER OF APPOINTMENT.—The amendments to the Political Code contained in the County Government bill, (so called), having been adjudged unconstitutional, there is no law authorizing an appointment by Superior Judges to fill a vacancy in the office of Supervisor; if there is power to appoint in such case it rests with the Governor, under Section 999, Political Code, or with the Board of Supervisors, under Section 4115, Political Code.

JD.—ID.—TENURE OF OFFICE.—A person elected Supervisor has the legal right to exercise and enjoy the office until his successor is duly appointed or elected.

APPLICATION for a writ of mandamus.

R. A. Redman, J. C. Martin, and W. H. & J. R. Glascock,
for Plaintiff.

Myers, the petitioner, actually fills the office, and has done so since his election in 1878. (*Brady v. Therrett*, 17 Kansas, 468; 20 Barb. 302; *People ex rel. Maloney v. Whitman*, 10 Cal. 38; *People v. Tilton*, 37 id. 614; *People v. Bissell*, 49 id. 407. Also, the opinions of the Justices in *Treadwell v. Supervisors of Yolo County*, id.)

Geo. E. Whitney, for Defendant.

Mandamus is an extraordinary remedy and will never issue where there is another adequate remedy. (2 Johns. Cas. 217, note; High on Extraordinary Remedies, § 6).

It is never issued where an office is already filled *de facto* under color of right. (High, Ex. Remedies, § 49 *et seq.*; 3 Johns. Cas. 76; *Bonner v. Pitts*, 7 Georgia, 473; *People v. Olds*, 3 Cal. 170; *Meredith v. Sup'rs Sac. Co.*, 50 id. 433; *Denver v. Hobart*, 10 Nevada, 30.)

THE COURT:

This is an application for a writ of mandamus to compel the respondent to permit the petitioner to join in performing the duties and exercising the functions of a member of the Board of Supervisors. The respondent demurred to the petition.

The petitioner was elected a member of the Board at the general election in September, 1878, for the term of three years commencing October 6, 1878. In January, 1882, citizens of Alameda county presented to two of the Judges of the Superior Court of said county a petition representing that a vacancy existed in the office of Supervisor, and asking that one Brown be appointed to fill the vacancy. After hearing the petitioners in such petition and the said Myers, the said Judges made an order reciting that a vacancy existed, and appointing said Brown to fill the vacancy.

Under the late Constitution and the statute thereunder, the power to appoint to fill a vacancy in a Board of Supervisors was with the County Judge. In *Leonard v. January*, 56 Cal. 1, this Court decided that the amendments to the

Political Code contained in the County Government bill (so called) were unconstitutional; therefore, there is no law authorizing an appointment by Superior Judges. If there is power to appoint in such case, it rests with the Governor, under Section 999, Political Code, or with the Board of Supervisors, under Section 4115, Political Code. It does not appear that Brown claims the seat other than as the appointee of the Superior Judges; and until a person is duly appointed or elected, the petitioner has the legal right to exercise and enjoy the office. (Political Code, 879.)

Demurrer overruled, with leave to answer in ten days.

[No. 8,236.—Department Two.]

March 24, 1882.

**F. F. MYERS v. N. HAMILTON ET AL., JUDGES OF THE
SUPERIOR COURT ETC.**

CERTIORARI—VACANCY IN OFFICE OF SUPERVISORS—APPOINTMENT BY SUPERIOR JUDGE.—Certiorari to review an order of the defendants (under Pol. C. § 4026) appointing a person to fill a vacancy in the office of Supervisor.

Held: The order was not an exercise of a judicial function within the meaning of § 1068 C. C. P.

APPLICATION for a writ of certiorari.

R. A. Redman, J. C. Martin, and W. H. & J. R. Glascock,
for Plaintiff.

Judges of the Superior Court are a part of the *judicial department of the State*, and cannot be vested with the exercise of "*mere ministerial power*," assuming that this is the result of their action here. (Sec. 1, Art. iii, New Const.; *People v. Provines*, 34 Cal. 520.) In hearing the petition of Carroll Cook et al.—in ordering Myers to be served—in determining the allegations of the petition to be true, and in passing upon the truth or otherwise of the statements contained in Brown's affidavit, and also upon his qualifications, they acted judicially. (8 Johns. 69; 16 id. 49; *People v. Provines*, 34 Cal. 541; *Robinson v. Supervisors*, 16 id. 208; C. C. P. § 1067.)

G. E. Whitney, for Defendants.

The act complained of is not judicial. (4 B. Monroe, 500, *People v. Bush*, 40 Cal. 344; *S. V. W. Co. v. Bryant*, 52 id. 136; *People v. Oakland Board Ed'n*, 54 id. 377.)

The COURT:

The petitioner applies for a writ of review to correct alleged errors of the respondents in declaring a vacancy in the office of Supervisor, and in appointing a person to fill the vacancy.

Even if the appointing power rested with the respondents, the exercise of that power was not the exercise of a judicial function within the meaning of Section 1068, C. C. P. (*People v. Bush*, 40 Cal. 344.)

The motion to quash the proceedings is granted.

[No. 8,272.—Department Two.]

March 27, 1882.

M. A. BLADE v. SUPERIOR COURT OF FRESNO
COUNTY.

PROHIBITION—SUNDAY LAW—PRACTICE.

APPLICATION for writ of prohibition.

The plaintiff was indicted in the Superior Court of the County of Fresno for a violation of the Sunday law; and the Court was proceeding to exercise jurisdiction of the case, when the alternative writ issued.

W. D. Tupper, for Plaintiff.

W. D. Grady, for Respondent.

The COURT:

In this case, which is an application for a writ of prohibition, it appearing that the prosecution has been dismissed in the above-named Superior Court, it is ordered that the application be denied, and the alternative writ heretofore granted is discharged.

[No. 7,159.—Department Two.]

March 27, 1882.

E. DONNELLY v. THOMAS B. HOWARD ET AL.

STREET ASSESSMENT DEMAND—RESOLUTION OF INTENTION—ADVERTISEMENTS FOR PROPOSALS—APPEAL TO SUPERVISORS.—In an action to enforce a lien for a street assessment in San Francisco, the defense was, that there was included in the assessment as well as in the demand, a charge of fourteen cents per front foot for work done which was not authorized by the resolution of intention, nor the invitation for sealed proposals.

Held: The defense was good, and was not affected by a failure of the parties aggrieved to appeal to the Board of Supervisors.

APPEAL by the plaintiff from a judgment for defendants, Thomas B. Howard and Mary T. B. Howard, and from an order denying a new trial in the Third District Court of the City and County of San Francisco. **THORNTON, J.**

J. M. Wood, for Appellant.

If the defendants had objected to the charge for the curbs as an improper one in the assessment, the Board had full power to have it corrected in that respect upon appeal.

This Court has held in similar cases that such appeal is the exclusive remedy. (*Chambers v. Satterlee*, 40 Cal. 519; *Creighton v. Pragg*, 21 id. 120; *Conlin v. Seaman*, 22 id. 548; *Emery v. Bradford*, 29 id. 85–87; *Taylor v. Palmer*, 31 id. 256; *Beaudry v. Valdez*, 32 id. 278; *Nolan v. Reese*, 32 id. 487; *Shepard v. McNeil*, 38 id. 74; *Barber v. San Francisco*, 42 id. 633; *Himmelmänn v. Hoadley*, 44 id. 279; *Dorland v. McGlynn*, 47 id. 50; *Oakland Pav. Co. v. Rier*, 52 id. 276–7.)

Jarboe & Harrison, for Respondents.

By including in the assessment the expenses of doing certain work which the Board of Supervisors had never ordered, no lien was created upon the land described in the complaint. (*Himmelmänn v. Satterlee*, 50 Cal. 68; *Dyer v. Chase*, 52 id. 440; *Schumacher v. Toberman*, 56 id. 508; *Beaudry v. Valdez*, 32 id. 276.)

The COURT:

Action to enforce a lien for a street assessment in San

Francisco. The defense is that there was included in the assessment, as well as in the demand, a charge of fourteen cents per front foot, amounting in the aggregate to sixteen dollars and eighty cents, for work done which was not authorized by the resolution of intention or the invitation for sealed proposals. The plaintiff meets this defense by the argument that it was the duty of the defendant to appeal to the Board of Supervisors, *and that was his only remedy*. We do not think so. It was held in *Dyer v. Chase*, 52 Cal. 440, that the demand must be for the amount properly chargeable against the lot. The Court there say that "the plaintiff is not entitled to recover unless he proves a demand for the amount legally due for the work," and that case was followed by this Court in *Schirmer v. Hoyt*, 54 Cal. 280.

We see no reason to depart from the rule there laid down. Judgment and order affirmed.

[No. 7,206.—In Bank.]

March 27, 1882.

JOHN THOMPSON ET AL., TRUSTEES, ETC. v. CHAS. H. JOHNSON ET AL.

AMENDMENT TO COMPLAINT—ANSWER—DEFAULT—PRACTICE.—Where a plaintiff amends in matter of substance, he, in effect, opens the default on the original pleading, and must serve his amended pleading upon the parties including the defaulting defendant.

ID.—ID.—ID.—ID.—CASE DISTINGUISHED.—*McGary v. Pedorena*, 58 Cal. 9, distinguished.

APPEAL by defendants, C. H. Johnson and Mariana G. Day, from a judgment for plaintiffs and defendant Eymond, and from an order refusing to set aside said judgment in the First District Court of the County of San Luis Obispo. FAWCETT, J.

W. J. & Wm. Graves, for Appellants.

The amended pleading of whatever nature takes the place of and supersedes the original, and the same rules are applicable to it in regard to the necessity of an answer, and as to the time within which that answer to be available must be

put in, and it should in all respects be governed by the rules, as to service, that apply to the original pleading. (*McMurray v. McMurray*, 9 Abb. N. S. 315; *Kelley v. McKibben*, 53 Cal. 13; *Elder v. Spinks*, 53 id. 293; *Low v. Graydon*, 14 Abb. 444; *Harriott v. Wells*, 9 Bosw. 631; *Fry v. Bennett*, 3 id. 200; S. C., 9 Abb. 45; S. C., affirmed, 28 N. Y. 324 (1 Tiff.); *Burrall v. Moore*, 5 Duer, 654; *Kapp v. Barthan*, 1 E. D. Smith, 622; *Seneca County Bank v. Galinghouse*, 4 How. 174; *Harriott v. Wells*, 9 Bosw. 631; *The Union Bank v. Mott*, 19 How. 267; S. C., 11 Abb. 42 (48) note; *Webb v. Wilkie*, 1 Cal. 153; *Holmes v. Lansing*, 1 Johns. Cas. 248; *Pease v. Morgan*, 7 Johns. 468; *Allaban v. Wakeman*, 10 Abb. 162.)

The amended pleadings necessarily affected all the parties defendant, and though they may have answered or demurred separately, still all should have been served with the amended pleading. (*Thomas v. Allen*, 2 Wend. 618; *Espino v. Nash*, 7 Hill, 167; *Akin v. Albany Northern Railroad Company*, 14 How. 337; *Allaban v. Wakeman*, 10 Abb. 162; *Fassett v. Tallmadge*, 15 Id. 205 (211); *People v. Woods*, 2 Sanf. 652; S. C. 2 Code Rep. 18; *Union Bank v. Mott*, 19 Howard, 267; *Fassett v. Tallmadge*, 15 Abb. 205; C. C. P. § 146.)

McD. R. Venable and *W. B. Dillard*, for Respondents.

The amendment introduced no new cause of action, nor ground of relief, and as to the interest of defendant Day, it was perfectly immaterial. Add it to the complaint, and that instrument still remains, to every material effect, only the same with which said defendant was served. Withdraw it, and the judgment lacks no necessary element of support. If lack of service was error, it is such as should be disregarded. (C. C. P. § 475.)

Had service been ordinarily necessary, the defendant, Day, under the circumstances, had no standing in Court which would entitle her to take advantage of its omission. By filing a frivolous demurrer in the case, for delay, she had been adjudged guilty of trifling with the Court, and by its order forbidden the privilege of answering plaintiff's complaint. An amendment thereafter which set up no new cause of action, nor prayer of relief, could not affect her rights. (*People v. Culverwell*, 44 Cal. 622.)

The Court had a right to withhold permission to answer. (*Seale v. McLaughlin*, 28 Cal. 672; 2 Waite Pr. 565; 1 Van Sant., Eq. Pl. 196.)

But such service was not necessary in any case, unless ordered by the Court. (*McGary v. Pedronena*, 58 Cal. 91.)

McKEE, J.:

Appeal from a judgment and an order denying a motion to set aside the judgment. The appeal from the order was not taken in time and is, therefore, dismissed.

It appears by the judgment roll that the action was commenced against five defendants to foreclose a mortgage. On the eighth of February, 1879, the plaintiff filed an amended complaint to which the defendants, Johnson and Day, interposed demurrers. Day's demurrer was adjudged to be frivolous and overruled, and leave was denied her to answer. But, at the same time, Johnson's demurrer was sustained, and the Court, by an order made and entered May 14, 1879, granted leave to the plaintiff to further amend his complaint, "the defendant to answer the complaint as amended within five days thereafter." Under this order the plaintiff filed an amendment to his complaint, showing, in substance, that there was a mutual mistake in the execution of the mortgage in this: That the mortgage as executed did not describe the premises intended to be mortgaged, and that in order to make it conform to the actual intention of the parties it was necessary that the description of the mortgaged premises should be amended, etc. A copy of this amendment was served upon the attorneys of the defendant, Johnson. The order did not provide for the service of the amendment upon the defendant Day; nor does the judgment roll show that the amendment, or the amended complaint, was served upon her; yet the Court proceeded to hear the cause upon the last amended complaint and rendered judgment against her for want of answer to the amended complaint.

We think this was error; for although her demurrer to the second amended complaint was adjudged frivolous, and she had been denied leave to answer, yet as the plaintiff, subsequently under the order of the Court, adjudging his complaint insufficient, filed an amendment in substance of his

former amended complaint, the amendment together with the original amended complaint, constituted a new complaint, which superseded all other pleadings in the case. All former pleadings and issues raised thereby were, therefore, substantially vacated. This new complaint necessarily affected all the parties defendants, and especially the defendant Day, who, it was alleged, had an interest in the mortgaged premises. It contained the facts which constitute the cause of action sought to be enforced against all the defendants, and it should have been served upon all, because each was in law entitled to answer it. It was error to limit the service of the amended complaint to one defendant only, when it affected all, and each was entitled to an opportunity to answer it. (§§ 465, 432, C. C. P.) The right to answer an amended pleading is one of which a party cannot be deprived even after entry of a default against him on the original pleading; for where a plaintiff amends in matter of substance, he, in effect, opens the default on the original pleading, and must serve his amended pleading upon all the parties, including the defaulting defendant. (*People v. Woods*, 2 Sandf., 652.)

The case of *McGary v. Pedrorena*, 58 Cal. 91, is not in conflict with these views. In that case the defendant appeared and answered the amended complaint, and it was held that *he* had no right to object on appeal that the complaint, as amended, had not been served on the other defendants. In this case, it is the defendant, who was not served, that objects, and appeals from the judgment.

Judgment reversed and cause remanded for further proceedings.

MORRISON, C. J., and MCKINSTRY, MYRICK, ROSS, and THORNTON, JJ., concurred.

[No. 7,028.—Department Two.]
March 27, 1882.

**LUKE DESCALSO v. MUNICIPAL COURT OF APPEALS
OF THE CITY AND COUNTY OF SAN FRANCISCO.**

**JURISDICTION OF THE MUNICIPAL COURT OF APPEALS OF SAN FRANCISCO—
TRANSFER OF CASE FROM COUNTY COURT—RETURN TO WRIT OF CER-
TIORARI—RECORD.**—The Municipal Court of Appeals could not acquire
jurisdiction of a case except by transfer from the County Court.
ID.—ID.—APPEARANCE.—In the absence of such transfer the voluntary ap-
pearance of the defendant could not confer jurisdiction.

APPEAL from a judgment in the Fifteenth District Court,
City and County of San Francisco, for the plaintiff upon a
writ of certiorari. DWINELLE, J.

These proceedings grew out of the case of R. C. Mowbray
against Luke Descalso (respondent herein) commenced in the
Justice's Court of the City and County of San Francisco, Oc-
tober 1, 1877. The complaint in this last named action was
on *quantum meruit* by Mowbray against Descalso for pro-
fessional services as a dentist.

The plaintiff recovered judgment against defendant in the
Justice's Court for the sum of one hundred and fifty-seven
dollars, and seven dollars and eighty cents percentage, and
ten dollars and fifty cents costs.

The defendant appealed to the County Court of the City
and County of San Francisco.

The transcript on appeal was filed in the County Court,
October 22, 1877.

On July 31, 1878, case was dismissed by the Municipal
Court of Appeals, on motion of defendant's attorney, no one
appearing for plaintiff, but was subsequently, by consent, re-
stored on motion of the plaintiff, and judgment rendered in
his favor.

Afterwards, upon a writ of certiorari to review the pro-
ceedings, the judgment appealed from was rendered, annul-
ing the judgment of the Municipal Court of Appeals.

The affidavit of plaintiff filed in the lower Court alleged:
That on or about the twentieth day of May, 1878, and
while said cause was pending on appeal in said County Court,

the said County Court, on its own motion and without the consent of affiant, made a general order transferring all cases then pending in said County Court on appeal from the Justice Court, to the Municipal Court of Appeals of the City and County of San Francisco, for trial.

That no order was ever made by said County Court in said cause, transferring it to said Municipal Court of Appeals.

The return to the writ contains no reference to the above or any order of the County Court transferring the case to the Municipal Court of Appeals.

Colin Campbell, for Appellant.

The general order of the County Court transferring the case of *Mowbray v. Descalso*, with others, from that Court to the Municipal Court of Appeals, was sufficient to give the last named Court jurisdiction of said case.

In fact, no order, general or special, on the part of the late County Court was necessary to transfer any case pending therein, on appeal from the Justice's Court, from said County Court to the Municipal Court of Appeals, after said last named Court had been established by the Act of the Legislature, approved April 1, 1878. (Vide § 12 of said Act—Statutes of Cal. 1877-8, p. 948.)

The case was pending on appeal from the Justice's Court at the time the said Municipal Court of Appeals was organized, and falls within that class of cases mentioned and provided for in Section 12 of Act creating the Municipal Court of Appeals, *supra*.

That section of the Act makes it the duty of the Clerk of the County Court to transmit to the Municipal Court of Appeals "all the papers in civil cases of appeal then pending and undetermined in said County Court." This act of transferring cases was a merely ministerial act on the part of the Clerk of the County Court, and any general order of the County Court transferring all cases of the class described to the Municipal Court of Appeals, or any order specially made in any particular case, was simply in excess of what was necessary.

The order of the Municipal Court of Appeals restoring the case to the calendar, by consent of the attorney for defendant,

after it had once been dismissed on his motion, was sufficient to give that Court jurisdiction of the case, even if we ignore all other proceedings therein; if that Court could in any event have obtained jurisdiction of the subject matter of the of the action. (*Davies v. Packard et al.* 6 Wend. 327; *Shay v. Superior Court*, 57 Cal. 541.)

Stanly, Stoney & Hayes, for Respondents.

But even under the doctrine of *Fraser v. Freelon*, 53 Cal. 644, the judgment in the case at bar must be affirmed. The question of jurisdiction when raised by certiorari must be determined solely by the return to the writ. The return cannot be contradicted on any question of fact, nor can it be helped out by any other paper. When the writ is issued, the petition or affidavit on which it was granted, except attacked by demurrer, or a motion to quash or supersede the writ, becomes *functus officio*. When return is made to the writ, the hearing and determination can be had only on that return, and it must show the jurisdiction. In the case at bar, as in *Fraser v. Freelon*, it does not appear from the return that the case was transferred to the Municipal Court of Appeals from the County Court. The return therefore fails to show that the former Court acquired jurisdiction of the cause of action.

The simple reply to appellant's fourth point, is that consent can only confer jurisdiction of the person, not of the subject matter or cause of action. (*Reynolds v. Harris*, 14 Cal.; *Hayes v. Shattuck*, 21 id.; *Mahoney v. Middleton*, 41 id.)

THE COURT:

It appears by the transcript that in the case of *R. C. Mawbray v. Luke Descalso*, that there was an appeal from the judgment of the Justice's Court to the County Court. But it does not appear that the case was ever transferred to the Municipal Court of Appeals which had jurisdiction to hear and determine civil appeal cases which were directed to be transferred to it from the County Court, and none other.

The defendant appeared in the Municipal Court of Appeals; and it is claimed that by so doing he submitted to its jurisdiction, and cannot now be heard to object to it. "The voluntary appearance of a defendant is equivalent to personal

service of the summons upon him." (C. C. P. 416). But the Municipal Court of Appeals could not acquire jurisdiction of the person of the defendant or the subject of the action except by a transfer from the County Court; and the law did not provide that the voluntary appearance of a defendant in the Municipal Court of Appeals should be equivalent to a transfer of the case to it from the County Court.

There were other points discussed which it is unnecessary to decide.

Judgment affirmed.

[No. 6,955.—Department One.]

March 27, 1882.

H. M. LEONARD v. GEORGE W. TYLER.

FORECLOSURE OF MORTGAGE—OPTION TO CONSIDER THE WHOLE AMOUNT DUE UPON FAILURE TO PAY INSTALLMENTS—COMPLAINT—PLEADING.—A mortgage contained a clause to the effect that if any of the installments of principal or interest should remain unpaid for ninety days after it became due, the whole amount of the note should become due immediately at the option of the payee or holder.

Held: Upon a failure to pay any of the installments of the note according to its terms the note became due immediately at the option of the payee, and it was not necessary for the payee, before commencing proceedings to enforce it for the full amount, to announce his option to the maker by notice in writing that he elected to consider the whole amount of the note as due; it was sufficient if he made his election, and demanded payment of the whole amount before the commencement of the action.

APPEAL from a judgment and for the plaintiff, and from an order overruling defendant's demurrer in the Third District Court of the City and County of San Francisco. **THORNTON, J.**

Geo. W. Tyler, for Appellant *in pro. per.*

Robinson, Olney & Byrne, for Respondent.

The COURT:

This was an action to foreclose a mortgage given to secure payment of a promissory note, payable in three equal installments of principal, and quarterly installments of interest. The mortgage contains a clause to the effect that if any of

the installments of principal or interest shall remain unpaid for ninety days after it shall become due and payable, the whole amount of the note shall become due and payable immediately, at the option of the payee or holder.

Default having been made in the payment of several of the installments of interest and of the first installment of principal, within the ninety days after they severally became due, the mortgagee commenced the action to foreclose, alleging, in his complaint, that he had elected to consider the whole amount of the note as immediately due. It is contended by the defendant that the complaint is insufficient, because it contains no allegations that the plaintiff elected to declare the whole amount of the note to be due, after the expiration of ninety days after the several installments had become due, and that he notified the defendant of his election before the commencement of the action.

But the complaint alleges the maturity of the first installment of principal, and of the several installments of interest; and that ninety days had elapsed after the maturity of each without payment of any one of them, although payment had been demanded; and "that the plaintiff elected to consider the whole of said principal sum expressed in said note as immediately due and payable, and demanded payment thereof from the defendant before the commencement of this action." These are, we think, sufficient averments of election and notice.

Upon a failure to pay any of these installments of the note, according to the terms thereof, the note became payable absolutely, at the option of the payee; and it was not necessary for him, before commencing proceedings to enforce it for the full amount, to announce his option to the maker by giving him notice in writing that he elected to consider the whole amount of the note as due immediately. It is sufficient if he made his election and demanded payment of the whole amount of the note before the commencement of the action.

There is no error in the judgment roll.

Judgment affirmed.

[No. 7,120—Department One.]
March 27, 1882.

A. TROBOCK v. W. CARO ET AL.

JURISDICTION OF MUNICIPAL COURT OF APPEALS—TRANSFER OF CASES FROM COUNTY COURT—ORDER NUNC PRO TUNC—SERVICE OF NOTICE OF APPEAL—JUSTICE'S COURT.—Appeal from judgment of affirmance (upon certiorari) of a judgment of the late Municipal Court of Appeals of the City and County of San Francisco, rendered upon an appeal purporting to have been taken by the defendant in the action to the County Court from a judgment of the Justice's Court of said City and County. Judgment was rendered in the Municipal Court October 15, 1879, but there was no order made by the County Court transferring the case until November 17, 1879, when an order of transfer was made, and ordered to be entered *nunc pro tunc*. There was no evidence in the record of service of the notice of appeal, or of a waiver thereof.

Held: The order of transfer made subsequently to the rendition of the judgment and entered *nunc pro tunc*, was wholly ineffectual to confer a jurisdiction on the Court which it had not at the time it attempted to exercise it.

Held, further: Without service of notice, the appeal was ineffectual, and the appellate Court acquired no jurisdiction of the case.

APPEAL from a judgment for the defendant in the Superior Court of the City and County of San Francisco. ALLEN, J.

N. B. Mulville, for Appellant.

The Municipal Court of Appeals had no jurisdiction, for the reasons: That a copy of the notice of appeal in either case was not served on plaintiff or his attorney. (§§ 974, 978, C. C. P.; *Harlan v. Pratt*, 50 Cal. 94.) That the attempted appeals were taken to the County Court and no transfer of the actions were made giving Municipal Court of Appeals jurisdiction over same. (Statutes of 1877-78, p. 947; *Frazer v. Freelon*, 53 Cal. 644.)

H. H. Lowenthal, for Respondents.

Appellant should not be heard in this Court, for no bill of exception or statement on appeal was ever prepared, served, presented to the judge for settlement, or settled. (Sec. 660 Civil Code; *Warner v. Holman*, 24 Cal. 229.)

McKEE, J.:

This is an appeal from judgment of affirmance of a judgment of the late Municipal Court of Appeals of the City and County of San Francisco, rendered upon an appeal purporting to have been taken by the defendant in the action, to the County Court of the City and County of San Francisco from the judgment of the Justices' Court of said city and county.

It is contended that the judgment of the affirmance is erroneous, because the Municipal Court of Appeals had not acquired jurisdiction of the case by appeal, and therefore its judgment is invalid and void, and should have been reversed.

The case was heard in the Court below upon the return made by the Municipal Court of Appeals to the certiorari issued in the case. The return consisted of the transcript of the record and proceedings in the action. Upon the return as made the Court below heard and determined the case—dismissed the writ of certiorari and affirmed the judgment of the Municipal Court of Appeals.

The return and the writ, with a copy of the judgment of the lower Court attached to them, constitute the judgment roll in the case.

By the roll it appears that judgment was rendered against defendant in the Justice's Court on the eleventh of July, 1879. From that judgment the defendant appealed to the County Court on questions of law and fact. The appeal was taken by filing a notice of appeal and an appeal bond on July 16, 1879. The bond was executed on July 15, 1879, and the notice of appeal was dated July 11, 1879, and directed to the Justice of the Justice's Court, in which the judgment had been rendered, and to the attorney of the plaintiff, but it does not appear to have been served upon, nor is there in the record any acknowledgment or waiver of service by the plaintiff in the action or his attorney.

The papers in the case were transmitted to the County Court, and the case appears to have been there pending when the Municipal Court of Appeals tried the case *de novo*, and rendered judgment for the defendant. That judgment was rendered on the fifteenth of October, 1879, but there was no order made by the County Court transferring the case to the

Municipal Court of Appeals, until November 17, 1879. On that day the County Court, for the first time, made the necessary order of transfer, and ordered it to be "entered *nunc pro tunc* as of the date of taking this appeal and the perfecting thereof." This order was filed in the Municipal Court of Appeals, November 18, 1879, more than a month after the rendition of judgment by that Court on the trial *de novo* of the case.

By Section 12 of the Act of 1878, which created the Municipal Court of Appeals, the Clerk of the County Court was required to transmit to the Municipal Court of Appeals, after its organization, all papers in civil cases of appeal then pending and undetermined in said County Court, and "thereupon said Municipal Court of Appeals shall have full power and jurisdiction over the same, and shall proceed to try and determine the same in the manner and with the same power, and to the same effect as the same might or could have been tried and determined in the County Court." (§§ 11 and 12, Acts of 1877-8, 948.) Until such transfer of the case was made and the papers of the case were transmitted by the Clerk of the County Court, jurisdiction to try and determine the case did not attach to the Municipal Court of Appeals. That Court was a Court of special and limited jurisdiction. It could not take jurisdiction, or try and determine cases other than those on appeal in which papers were transmitted to it in the manner prescribed by the statute under which it organized. Where the record shows that no transfer or transmission had been made to it when it exercised jurisdiction over a case its judgment is void; for it is essential to the validity of a judgment that it be rendered by a Court of competent jurisdiction at the time and the place and in the form prescribed by law. (*Norwood v. Kenfield*, 34 Cal. 329.) The order of transfer and transmission made subsequently to the rendition of the judgment, and entered *nunc pro tunc*, was wholly ineffectual to confer a jurisdiction on the Court which it had not at the time it attempted to exercise it.

Besides, service of the notice of appeal on the adverse party was required by Section 974, C. C. P., at the time of the tak-

ing of the appeal in the case from the judgment of the Justice's Court. Without such service the appeal was ineffectual, and the appellate Court acquired no jurisdiction of the case. Having no jurisdiction to try and determine the case, its judgment was void, and the judgment of affirmance by the Court below is erroneous.

Judgment reversed and cause remanded.

MCKINSTRY and ROSS, JJ., concurred.

[No. 7,530—Department One.]
March 27, 1882.

ANTONIO TROBOCK v. WOLF CARO.

LEASE—ILLEGAL CONSIDERATION—FINDING.—In an action for rent, the defendant pleaded that the premises were let to him for the purpose of being used as houses of prostitution, with the knowledge and consent of the plaintiff, but the Court found to the contrary. *Held:* The evidence sustains the finding.

APPEAL from a judgment for the plaintiff and from an order denying a new trial in the Superior Court of the City and County of San Francisco. LATIMER, J.

Rosenbaum & Scheeline, for Appellant.

N. B. Mulville, for Respondent.

The COURT:

This was an action brought to recover rent due for three months of the year 1879, upon a lease of certain premises in the City and County of San Francisco. The defense was that the lease was void, because the premises were let for an illegal purpose. But the Court found that they were not let for an illegal purpose. Even if there were a conflict of evidence the finding would not be disturbed; but the evidence in the record fully sustains the finding.

Judgment and order affirmed.

¹ *Dalzell v. Superior Ct.*, 67 Cal. 464.

[No. 7,615.—In Bank.]

March 28, 1882.

CALIFORNIA FRUIT AND MEAT SHIPPING COMPANY v. SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO.

JURISDICTION OF THE SUPERIOR COURT—APPEAL FROM JUSTICE'S COURT—CONSTITUTIONAL LAW.—Under the Constitution and prior to any act of the Legislature relating to appeals from Justices' Courts, the Superior Court had jurisdiction of such appeals.

APPLICATION for writ of certiorari.

T. Z. Blakeman, for Plaintiff.

Before the new Constitution went into effect appeals from Justices' Courts were to the County Courts. The law did not grant appeals from Justices' Courts in general terms, but to County Courts only. (Laws of 1865, 426, § 11; Olney's Code of Civil Procedure, § 974.)

The new Constitution, in creating the Superior Courts, specified their original jurisdiction, but left their appellate jurisdiction to be prescribed by law. (Art. vi. § 5, New Cont.) And the legislature did not fix its appellate jurisdiction until March 26, 1880. (Laws 1880, p. 53.) The case at bar was begun in Justice's Court, February 4, 1880, and ended in that Court by judgment, February 10, 1880.

A law authorizing an appeal to the County Court could not give an appeal to the Superior Court. "If the law which gives an appellate Court jurisdiction is repealed or expires, the Court loses its appellate power even though an appeal be pending." (*United States v. Burton*, 8 How. 121; *McNulty v. Bently*, 10 id. 72.)

The right of appeal is a creature of statute. (Houghton's Appeal, 42 Cal. 60.) Where jurisdiction is conferred on an inferior Court, its decision is final, unless provision is made by statute for an appeal. (*Ward v. People*, 13 Ill. 636.)

The Act of February 4, 1880 (Laws of 1880, p. 3, § 2) can not be relied on to sustain appeals to Superior Courts, because said Act is unconstitutional and void, for the reason that it was not read at length three times prior to its passage.

(House Journal, Session 1880, pp. 13 and 24; Art. iv. § 15, New Cont.; *Weill v. Kenfield*, 54 Cal. 111.)

And further the said Act of February 4, 1880, is void as to that portion of it which attempts to give the Superior Courts jurisdiction of appeals from Justices' Courts; because this was a subject not expressed in the title. (Art. iv. § 24 New Cont.; *Wood v. Board of Elec. Comm.*, 7 Pac. C. L. J. 641.)

The provision of § 11, Art. xxii, new Cont., is not in conflict with the position above taken, for the reason that the appellate jurisdiction of the Superior Courts was not a part of the judicial system created by the new Constitution.

Robinson, Olney, and Byrne, for Defendant.

It is argued that the right of appeal from an inferior Court to a higher tribunal is purely statutory. In other words, if the statute does not expressly confer the right, it does not exist at all. As an abstract proposition this is true; but in the present case we claim that the rule is not applicable; and for these reasons:

1. The Courts which existed under the old Constitution were not "abolished," in the literal and ordinary sense of that term. They were in fact superseded by the judicial system created by the new Constitution, which took effect simultaneously with the expiration of the life of the old system.

2. The new Constitution wisely provides that all laws in force at the time of its adoption, not inconsistent with it, shall remain in force until altered or repealed by the Legislature. The new Constitution further preserves "all rights, actions, prosecutions, claims, and contracts of the State, counties, individuals, or bodies politic, not inconsistent therewith." Is not the right of appeal one of the "rights" of individuals thus expressly protected?

3. But the Constitution goes further and provides that even such laws as are inconsistent with it, and for that reason require legislative action to make them conform to its provisions, shall remain in force until the first day of July, 1880, unless sooner altered or repealed; so that even if the pre-existing statutes regulating appeals from Justices' Courts were inconsistent with any provisions of the new Constitution they remained in force until the passage of the Act of

March 26, 1880, which provides the Superior Courts with the most ample machinery for the proper exercise of its appellate jurisdiction as conferred by the Constitution.

4. As if "to make assurance doubly sure," Section 11 of Article xxii declares that "all laws relative to the present judicial system of the State shall be applicable to the judicial system created by this Constitution until changed by legislation."

The COURT:

Application for a writ of review. In this case, judgment was recovered in the Justice's Court of the City and County of San Francisco on the tenth day of February, 1880, and an appeal was taken from this judgment to the Superior Court of the City and County of San Francisco on the fourteenth day of the same month. At that time, there had been no legislation since the Constitution of 1879 went into effect, in relation to appeals in cases arising in Justices' Courts.

It is urged here that under the former Constitution the only appeal from such judgments was to the County Court; that the County Court was abolished by the present Constitution (Art. xxii, § 3); that this Constitution only vested appellate jurisdiction in the Superior Courts "in such cases arising in Justices' Courts," "as may be provided by law" (Constitution, Art. vi, § 5)—and that inasmuch as the Legislature had not acted on this subject after the present Constitution went into operation, and when the appeal in this case was taken, such appeal was without warrant of law, the Superior Court had no jurisdiction, and its action was null.

But by the Constitution (Art. xxii, § 11) it is provided that "all laws relative to the present judicial system of the State, shall be applicable to the judicial system created by this Constitution, until changed by legislation."

The laws referred to in this section defined the cases arising in Justices' Courts in which appeals were allowed. Such laws were continued in force, and the effect of this provision was to prescribe by law the cases arising in the Courts referred to in regard to which the appellate jurisdiction was vested in the Superior Courts, and on which such jurisdiction was to operate. (*The People v. Dutcher*, 83 N. Y. 240.)

We are of opinion that the Superior Court had jurisdiction of the appeal, and the writ must be denied.

The above is decisive of the case, and therefore it becomes unnecessary to pass on the other questions discussed on the argument of the cause.

Writ denied and application dismissed.

[No. 6,903.—Department Two.]

March 28, 1882.

ESTATE OF R. K. EASTMAN.

BEQUEST TO RELIGIOUS CORPORATION.—Bequest of two thousand dollars “to the Wardens and Vestrymen of St. John’s Episcopal Church of Stockton, for the purpose of purchasing a chime of nine bells, for the benefit of the Church.” St. John’s Episcopal Church of Stockton was a corporation duly organized for religious purposes under the Act of April 22, 1850, entitled “An Act concerning corporations.”

Held: Under the provisions of the Act the corporation is expressly authorized to take by will.

ID.—STATUTES CONTINUED IN FORCE BY CODES.—By § 288 C. C. the provisions of the Act of April 22, 1850, were continued in force as to corporations created under them.

APPEAL by the wardens and vestrymen of St. John’s Episcopal Church from a judgment of the Probate Court of the County of San Joaquin. BUCKLEY, J.

W. L. Dudley and *J. B. Hall*, for the Appellant.

Has the church the legal capacity to take this bequest? (Act concerning Corporations of April 22, 1850, §§ 1, 178, 181–2; Hittell’s General Laws, paragraphs 746; 1027, 1030, 1031.) The record affirmatively shows, that the church has not voluntarily thrown off or surrendered this power; for, it appears by the record, that the existence of the corporation is continued, not under the provisions of Part iv. of Division First of the Civil Code, §§ 287, 288, but under the provisions of the creative organic Act of April 22, 1850. (*Reclamation District v. Kennedy*, 58 Cal. 124.)

Of these powers and privileges is one empowering the appellant to receive “real or personal estate, and whether given,

granted or devised;" and this right remains with the appellant unless taken from it by Section 1275 of the Civil Code. This section does not purport to alter or amend the Act of April 22, 1850—the appellant's incorporating Act. The appellant's right to take as a devisee—plainly expressed in the incorporating statute of 1850—is studiously saved by the very section (1275, Civ. Code,) by which, it is claimed, the right has been destroyed. The saving clause follows the words of a similar provision in the Statute of Wills as found in the revised statutes of New York. (*White v. Howard*, 46 N. Y. 144, 163–5; *Estate of Hinckley*, 58 Cal. 457; *Bascom v. Albertson*, 34 N. Y. 599.)

Terry & McKinne, for Respondents.

No brief on file for Respondents.

THORNTON, J.:

This case involves the validity of a bequest made by the last will and testament of R. K. Eastman, deceased, of two thousand dollars, "to the Wardens and Vestrymen of St. John's Episcopal Church of Stockton, for the purpose of purchasing a chime of nine bells, for the benefit of the church."

This bequest was on the final distribution of the estate assailed by the heirs-at-law of the testator, on the ground that the St. John's Episcopal Church, for whose benefit this bequest was made, was not competent to take, and the bequest was therefore void.

To sustain this ground, reference is made to Section 1275 of the Civil Code, which is in these words: "A testamentary disposition may be made to any person capable by law of taking the property so disposed of, except corporations other than those formed for scientific, literary, or solely educational purposes, can not take, under a will, unless expressly authorized by statute."

It appears from the record that St. John's Episcopal Church of Stockton, was a corporation duly organized and incorporated under the Act of the Legislature of the State of Cali-

fornia, entitled, "An Act concerning corporations," passed April 22, 1850, and the several Acts amendatory thereof and supplementary thereto, for religious, and not for either scientific, literary, or solely educational purposes, and that said church continued still to be a corporation when the proceeding above referred to was commenced.

That this corporation is expressly authorized by statute to take by will is evident from subdivision 4 of Section 1 of the Act of twenty-second of April, 1850, and Sections 178, 181 and 182 of same Act. (See Hittell's General Laws, paragraphs 746, 1027, 1030 and 1031.)

It may be urged that the sections of the Act of April 22, 1850, referred to, do not now exist. In our judgment these laws as applying to corporations which were formed and existed under them, of which the St. John's Episcopal Church of Stockton is one, were continued in force as to such corporate bodies, by Section 288 of the Civil Code. The repeal effected by this section only related to corporations formed after the Civil Code went into effect.

The bequest is in accord with and to carry out the objects of the corporation.

It follows from the above that the Court below erred in holding this bequest void and in distributing the estate in disregard of it. The decree of the Court is therefore reversed, and the cause is remanded with directions to the Court below to modify its decree so as to make it conform to the views herein expressed.

MORRISON, C. J., and ROSS. SHARPSTEIN, MCKINSTY, and MCKEE, JJ., concurred.

MYRICK, J., dissented.

[No. 7,618.—In Bank.]

March 28, 1882.

**CLARENCE R. GREATHOUSE ET AL. v. JOHN P. DUNN,
AUDITOR ETC. ET AL.**

CITY HALL COMMISSIONERS—POWER TO EMPLOY COUNSEL.—Appeal from a judgment denying a writ of mandamus to the City Auditor to audit a claim of the plaintiffs allowed by the Board of City Hall Commissioners July 21, 1880, for professional services as attorney.

Held: The Board of City Hall Commissioners had no authority to employ or pay counsel; such payment is prohibited by Section 12 of the Act of March 24th, which was in force when the employment of the plaintiffs took place.

APPEAL from a judgment for the defendant in the Superior Court of the City and County of San Francisco.

The case in the Court below was an application for a mandamus to require the defendant Dunn, as Auditor for the City and County of San Francisco, to audit a demand in favor of plaintiffs on the treasury of the said city and county. The demand is for three thousand dollars, and was allowed by the New City Hall Commissioners in payment of a claim for legal services rendered by the appellants at the request of the Commissioners in certain litigation between the New City Hall Commissioners and the Board of Supervisors.

The petition alleged that the services were rendered under an agreement with the Board of New City Hall Commissioners; that they were of the value of three thousand dollars; that the demand for that sum was allowed by the Board; that it was subsequently presented to the respondent as Auditor, and he was requested to audit it, but he refused so to do; that it is his official duty to audit the demand.

The answer admitted that the appellants were employed to conduct the litigation, and that they rendered the services, but denied that they were of the value of three thousand dollars, and denied that the Commissioners had power to employ or allow pay to appellants.

Appellants demurred to the answer, that it did not state facts sufficient to constitute a defense.

The Court heard arguments on this demurrer, and made an order overruling the demurrer and dismissing the writ.

H. G. Platt, for Appellants.

The Board of New City Hall Commissioners are a municipal corporation for a certain purpose—to complete the New City Hall. They are charged with that duty, and, so far as it is concerned, have all the powers that are expressly granted, such as are incident to the powers granted, such as may be fairly implied from the language of the charter, and such as are essential to the duties of the corporate body.

In this country a public corporation may be created by implication.

“To the extent necessary to execute the special powers and functions with which it is endowed by its charter, there is indeed an implied and incidental authority to *contract obligations* and *sue* and be *sued* in the corporate name.” (Dillon on Municipal Corp. § 42.)

The power to sue and be sued has long been recognized in this State as belonging to all public corporations; and even Reclamation Districts, whose functions are very limited, are held to be public corporations. (*People v. Rec. Dist. No. 108*, 53 Cal. 348; *Dean v. Davis*, 51 id. 409.) And there are numerous cases in our reports where such bodies appear as parties, one of the latest of which is *The Delphi School District v. Murray*, 53 Cal. 29.

In the very case out of which this claim arose (*The Board of New City Hall Commissioners v. The Board of Supervisors*), the Supreme Court recognized the power of the Commissioners to sue, for the Court granted the writ of mandate in their favor as the party in interest. The power to sue carries with it the incidental power of employing and paying counsel. Where there is a fund at the disposal of a public Board, as in this instance, there can be no doubt at all on this point unless there is some express prohibition. The power to employ counsel is inherent and incidental, and no limitation has been placed upon it. (*Smith v. Mayor of Sacramento*, 13 Cal. 533; *Hornblower v. Duden*, 35 Cal. 664–670.) In this case, however, there is nothing said about counsel for the Board. The City and County Attorney is a member of the Board, but he is not the attorney or counsel of the Board. On the contrary, he is the attorney and counsel of the Board of Supervisors,

being entirely under their control. (*Bank of California v. Shaber*, 55 Cal. 322; Section 1, Act of March 25, 1862, Stat. 1862, p. 98.)

The City and County Attorney could not be attorney for both boards in cases where they are opposing parties, and certainly could not appear against the Board of Supervisors; hence the Board of Commissioners were compelled to employ counsel.

The power to employ counsel arises from the power to make contracts, to own property, and to incur liabilities. (Dillon on Municipal Corp. § 479 and note.)

Robert Ashe, for Respondent.

The moneys arising from the New City Hall tax shall be kept by the Treasurer, in a fund known as the New City Hall Fund. (Sec. 12 Consolidation Act, 205.) Sec. 12 provides that "no part of said fund shall be expended for any other purpose than that herein indicated." This is a special statute, and confers limited powers, and must be strictly construed. (Sedgwick St. and Con. Law, 329, 330; Cooley Con. Lim. 494, 495 and 496, and notes.)

In this view of the case it is unnecessary to consider to what extent the Board is a corporation.

The COURT:

In this cause, the judgment is affirmed. The Board of City Hall Commissioners had no authority to employ or pay counsel. Such payment is in our view prohibited by Section 12 of the Act of March 24, 1876 (Stats. 1875-76, p. 464), which was in force when it is claimed the employment of the plaintiffs was made.

We append here the section referred to, which is in these words:

"The money arising from the tax hereby authorized to be levied and collected, shall be kept by the City and County Treasurer in a fund to be known as the 'New City Hall Fund,' and out of which said fund all claims for work, labor and materials used in the construction of said building, and the salaries of the Commissioners, the Secretary, the Architect, the Superintendent of Works, and others employed in

and about the construction of said building, and necessary office expenses of the Board of Commissioners, shall be paid. All claims against the said fund shall be allowed by the Board of Commissioners, by resolution entered upon their minutes, before the Auditor shall be authorized to audit the same, and in no case shall any portion of said fund be used or expended for any other purpose than that herein indicated, nor shall any part of the cost of the construction of said building be paid out of any other or different fund; nor shall any lien for work, labor or material, at any time attach to the said building nor the land upon which the same is located, in any manner whatever. The Board of Commissioners, in each fiscal year, may make contracts, and expend in the construction of said building a sum equal to the estimated receipts of the fund during the current fiscal year, but no larger or greater sum.

Judgment affirmed.

[No. 7,031.—Department One.]

March 28, 1882.

D. HARNEY v. WILLIAM CORCORAN ET AL.

AMENDMENT OF ANSWER—DISCRETION OF COURT—STREET ASSESSMENT—

PRACTICE.—In an action against the appellants and other defendants to foreclose a street assessment lien upon a lot in San Francisco alleged to be the property of defendants, the appellants—having in their original answer admitted ownership of the premises in dispute—moved for leave to file an amendment, in which by way of separate defense they denied ownership; and the motion was denied.

Held: The refusal to allow the filing of the amendment, under the circumstances in which the application was made, was not an abuse of discretion with which this Court will interfere.

Id.—Id.—Id.—Id.—AMENDMENT OF COMPLAINT—SERVICE OF AMENDMENT.

Upon the case being called for trial the plaintiff dismissed the action as to certain of the defendants not served, and by leave of Court amended the complaint by erasing their names from the title; and thereupon the appellants moved for leave to answer the complaint as amended by re-filing the amendment previously offered—which motion was denied.

Held: The amendment of the complaint was not such an amendment as the law or rules of the Court required to be served upon the defendants, or which entitled them to answer.

APPEAL from a judgment for the plaintiffs and from an order denying a motion for a new trial in the Twenty-third District Court of the City and County of San Francisco. THORNTON, J.

Wm. Leviston, for Appellants.

1. The defendants had the right to amend their answer once, as a matter of course. (C. C. P. § 472.)

2. The affidavit and amended answer showed sufficient cause for allowing the amendment even though it was not a matter of course. (*Kirsten v. Madden*, 38 Cal. 158.)

This is an action *in rem* and all the owners must be made parties, and the allegation of ownership is material. (*Harney v. Appelgate*, Feb. 9, 1881; *People v. Doe*, 48 Cal. 560; *Hancock v. Bowman*, 49 id. 413; *Clark v. Porter*, 53 id. 409; *Diggins v. Reay*, 54 id. 525; § 13 of the Street Assessment Act; § 382 C. C. P.) The appellants were entitled, as requested, to answer the complaint as amended. (C. C. P. §§ 432, 472.) The decision of this Court in the case of *Harney v. Appelgate*, 57 Cal. 205, is decisive of this case.

J. M. Wood, for Respondent.

In these street assessment cases it is well settled that no personal judgment can be rendered, and if the proposed amended answer of the defendants Porter and McLeran were true, and they are neither of them owners of the land involved here, they have no occasion to be aggrieved by the judgment entered, since it does not concern them in the least. Nor was it any of their concern whether or not the plaintiff had succeeded in bringing in all the proper parties defendants. Nor could their rights be affected by a dismissal granted as to some of the original defendants, even though it might be true that such defendants so dismissed were also owners of the premises.

The amendment to the caption of the complaint made at the trial, by striking out therefrom the names of the defendants, as to whom the cause was by leave of Court dismissed, did not entitle defendants to a continuance, nor to further service of a copy of the complaint as so amended. (*Brock v. Martinovich*, 55 Cal. 516.)

McKEE, J.:

The action in this case was commenced against a number of defendants to foreclose a street assessment lien on a lot of land in the City and County of San Francisco. Some of the defendants appeared and answered; others were not served with process. Among those answering were the appellants. By their answers, they admitted ownership of the premises in dispute. Subsequently, however, they filed another answer in which they denied ownership. But as that answer was filed without leave of the Court or consent of counsel, it was, on motion of the plaintiff's attorney, stricken from the files. The defendants then moved to be allowed to re-file the answer as an amendment to their answer on file, and this motion was denied by the Court, except as to so-much of it as set up the defense of payment. To this ruling the appellants excepted, and now assign it as error.

The proposed answer was not an amendment to the answer on file. It raised an issue antagonistic to the issue made by the complaint and the defendants' original answer.

Whether a party shall be permitted to file an additional answer which changes the issue already made in the case, is a matter for the sound discretion of the trial Court. The refusal to allow the filing of such an answer under the circumstances in which the application was made, is not an abuse of discretion with which this Court will interfere.

In *Stuart v. Lander*, 16 Cal. 372, we held that it was not error for a Court to refuse permission to set up the statute of limitations after answering to the merits. In *Page v. Williams*, 54 Cal. 562, it was held that the Court below properly exercised its discretion in refusing to allow a defendant to set up, by way of amendment, want of consideration of the promissory note in suit, after the case had been at issue upon the plea of payment. And in *Spanagel v. Reay*, 47 Cal. 608, it was held, that where a defendant admits in his answer a material allegation of the complaint, he should not be allowed to amend his answer by changing the admission into a denial, after the case has been tried on the issues as framed and a new trial granted.

Upon the case being called for trial upon the issues made

by the pleadings, appellants objected to proceeding with the trial of the case, until certain persons named in the complaint as parties defendants were served with process. In response to the objection, the plaintiff dismissed the action as to those persons, and by leave of the Court, amended the complaint by erasing their names from the title of the action contained in the complaint. To this the appellants' attorney excepted, and, at the same time, moved, upon his affidavit, for permission to answer the complaint as amended, by refiling the answer which had been stricken from the files. The motion was denied and the appellants excepted.

Plaintiff had the right to dismiss the action against any parties who had not been served with process. There was no abuse of discretion in permitting it to be done, nor in allowing the names of such parties to be stricken from the title of the action, nor in refusing to allow the appellants to answer the complaint, as it was with those names erased. The body of the complaint was not changed in any respect. There was, therefore, nothing which required a new answer. The parties were ready for trial upon the issues which had been framed. Striking from the title of the action the names of one or more defendants did not change in any way those issues nor render necessary any additional answer. The amendment of the complaint was not such an amendment as the law or rules of the Court required to be served upon the defendants, or which entitled them to answer. (*Brock v. Martinovich*, 55 Cal. 516.)

Judgment and order affirmed.

ROSS, J., concurred in the judgment.

McKINSTRY, J., concurring:

I concur. If, after the amendment of the complaint, the defendants appealing had asked leave to file an amended answer setting forth that the persons originally named as defendants, and whose names had been stricken from the complaint, were owners in part, or had some estate or interest in the lands, it might have been error to deny the application. But the amended or supplemental answer which the defendants asked leave to file contained no such averment.

Nor was there error in denying the application to file the amended answer when the application was first made. The amended answer was tendered as a whole, and certain of the averments contained in it are so manifestly improper that the Court was fully justified in refusing to consider them as creating an issue. The answer was verified by defendant Porter, one of the appellants. Yet the amended answer contained the statement following: "The defendant Porter claims to be the owner of some interest in said premises, but these defendants have no information or belief on the subject sufficient to enable them to answer the allegation of the complaint that the defendant Porter is one of the owners of said premises, and on that ground solely, they deny that said Porter was at the date of the assessment alleged in said complaint, or at any time since has been, or is, the owner of said premises, or any part thereof."

The word "owner" as employed in the law under which these proceedings were brought, has a distinct meaning, and whether he was or was not the owner was a matter peculiarly within the knowledge of defendant Porter. Under these circumstances it has been repeatedly held that a denial in the form adopted in the portion of the amended answer is insufficient. It could be properly treated as uncertain and evasive, and it was, to say the least, discretionary in the Court below to refuse to permit the filing of an answer containing such uncertain and evasive allegations.

[No. 7,315.—In Bank.]

March 29, 1882.

JAMES T. BOYD ET AL. v. CUTHBERT BURREL ET AL.

STIPULATION—NEW TRIAL—BILL OF EXCEPTIONS—PRACTICE.—After a motion for a new trial had, by consent of parties, been passed upon by C., the District Judge, who tried the case—upon a bill of exceptions amended and settled but not engrossed,—a dispute arose between counsel as to the engrossment. Thereupon—June 17, 1880—it was stipulated "that the bill of exceptions, as engrossed by plaintiff, together with the bill as prepared by plaintiffs and the amendments proposed by defendants, and the order of Judge C., settling said bill, be all sent to Judge C. for him to decide if said bill is properly engrossed, and if not properly engrossed to correct the same, and sign said bill as of December 1, 1879, when so corrected." Subsequently, Judge C., after strik-

ing out certain portions of the bill as engrossed by the plaintiffs, certified the same as correct, and afterwards the defendants moved the Judge of the Superior Court to strike out portions of the bill. *Held*, that, in view of the stipulation, it was not error to deny the motion.

APPEAL from an order made after judgment in the Superior Court of the County of Fresno. **HOLMES, J.**

The order of the Judge settling the bill of exceptions was as follows: "The bill of exceptions in this case has been agreed upon by the respective counsel, the amendments to be inserted as agreed herein, and copy to be engrossed and presented to Judge for settlement to be signed as of to-day. Objection to bringing on motion for a new trial, that statement has not yet been formally engrossed and signed, waived in open Court."

The plaintiffs' attorney, in engrossing the bill, inserted a specification of errors which was not contained in the bill as settled, and the defendants' attorneys objected to the engrossed bill on that account. Thereupon the attorneys entered into the stipulation referred to in the opinion, the full text of which is as follows:

"**STIPULATION AS TO ENGROSSMENT OF BILL OF EXCEPTIONS.**"—Whereas, on the first day of December, 1879, plaintiffs' bill of exceptions in the above entitled cause was by the Judge of the Thirteenth District Court settled, and the same was to have been engrossed as settled, and whereas, plaintiffs and defendants differ as to whether said bill has been by plaintiffs' attorney properly engrossed.

"It is hereby stipulated that the bill of exceptions, as engrossed by plaintiffs, together with the bill as prepared by plaintiffs, and the amendments proposed by defendants, and the order of Judge Campbell settling said bill, be all sent to Judge Campbell, for him to decide if said bill is properly engrossed, and if not properly engrossed to correct the same and sign said bill as of December 1, 1879, when so corrected.

"The defendants to point out on or before June 19, 1880, the errors they claim to have been committed by plaintiffs in engrossing said bill, and plaintiffs to have until June 21, 1880, to reply to such points made by defendants.

"Dated June 17, 1880.

"HARMON & GALPIN, for plaintiffs.

"STETSON & HOUGHTON, for defendants."

After the engrossed bill was signed by Judge Campbell, the attorneys for defendants moved the Superior Court to strike out the assignments or specifications of errors annexed to the bill, and the motion was denied.

Stetson & Houghton and McAllister & Bergin, for Appellants.

The bill of exceptions as settled contained no assignment of errors. The plaintiffs' attorneys engrossed the bill of exceptions and presented it to defendants' attorneys and requested them to certify to its correctness. Said attorneys declined to so certify, for the reason that the bill as engrossed contained an admission purported to have been made by defendants' attorneys that was not in the bill of exceptions so settled.

An appeal from an order denying a motion for a new trial, must be heard upon the same record which was used in the lower Court. It cannot be heard upon another and different record. "In passing upon a motion for a new trial, we (the Supreme Court) are confined to the record upon which the Court below ruled." (*Quivey v. Gambert*, 32 Cal. 306.)

Counsel for plaintiffs seek, by having this assignment of errors added, to place themselves in a position to make points in the Supreme Court that they could not raise in the District Court on the argument on motion for a new trial. We prepared our amendments to meet their case as prepared and points made in their bill of exceptions on motion for a new trial, and not to meet any points they might think it proper to make after their motion was denied. They cannot now add an assignment of errors or anything else to their bill of exceptions. Such assignments can only be allowed before settlement, and then the adverse party must have an opportunity to prepare such amendments as he may think proper. (*Lucas v. City of Marysville*, 44 Cal. 210.)

Counsel for plaintiffs claim, as we understand them, that they can add to or change their bill at any time before it is engrossed. Possibly counsel are correct, and on a proper motion to the Court an amendment would be allowed; but after a bill is settled and motion for a new trial granted or denied on that bill as settled, no change can be made in it that will

necessitate the Supreme Court passing upon the case upon a record in any manner differing from that used in the District Court as a basis of the order made. This is both law and common sense. (*Satterlee v. Bliss*, 36 Cal. 489; *Kimball v. Semple*, 31 id. 663; C. C. P. § 661.)

If counsel for plaintiff are correct in their position that the bill of exceptions was not settled when the motion for a new trial was denied, and they would now settle it and add an assignment of error, they must do it at the expense of their appeal from the order denying the motion for a new trial, for if there was no settled statement when that motion came on for hearing and was denied, the Court could not do other than deny the motion. (*Thompson v. Patterson*, 54 Cal. 546; *Smith v. Davis*, 55 id. 26; *McCreery v. Everding*, 44 id. 284.)

After the motion was denied, vitality can not be given to the bill or statement and thus place the Supreme Court on an appeal in a position to review an error never committed. "Such a practice is not permissible." (*Copler v. C. P. R. R. Co.* 6 Nev. 272; *Brown v. Murray*, Feb. 6, 1879.)

Judge Campbell, who ceased to be Judge some six months before this amendment was obtained, had no power to change the records of the Court. A Judge who tries a case after leaving the bench, may settle and sign a bill of exceptions. (§ 653, C. C. P.) But he can not add to or take anything from one already settled.

Philip G. Galpin, for Respondent.

The Judge of a Superior Court ought not to alter on motion the statement settled by a District Judge who tried the cause; a refusal to do so was correct, and should be affirmed.

In settling the statement the District Judge exercised his discretion, and there was no such abuse of discretion as warranted the interference of the Superior Judge; his refusal should be affirmed.

The assignments of error were purely formal, and were added before the statement was signed.

Parties may stipulate that the Court pass on the motion before statement is engrossed, and engrossed statement is agreed to. (*Thompson v. Connelly*, 43 Cal. 636.)

The District Judge had power to amend a statement after it had been settled and signed for the purpose of adding the formal specifications of error—not to change the facts—or the exceptions. (*Valentine v. Stewart*, 15 Cal. 387; *Loucks v. Edmondson*, 18 id. 203; *Lucas v. City of Marysville*, 44 id. 210.)

McKINSTRY, J.:

After a motion for new trial had, by consent of parties, been passed upon by the Hon. J. B. Campbell, Judge of the District Court, upon a bill of exceptions amended and settled, but not engrossed—the bill as settled to be subsequently engrossed by the moving party and signed by the said Judge—a dispute arose between counsel as to whether the bill had been engrossed as settled. Thereupon, and on the seventeenth day of June, 1880, it was stipulated “that the bill of exceptions as engrossed by plaintiff, together with the bill as prepared by plaintiffs and the amendments proposed by defendants and the order of Judge Campbell settling said bill, be all sent to Judge Campbell for him to decide if said bill is properly engrossed, and if not properly engrossed to correct the same and sign said bill, as of December 1, 1879, when so corrected.”

Subsequently the Honorable J. B. Campbell, in the stipulation mentioned, to whom was submitted the several papers mentioned, after striking out certain portions of the bill, as engrossed by plaintiffs, certified to the same as correct.

And afterwards defendants moved the Judge of the Superior Court to strike out a portion of the bill, as the same had been settled and certified correct by the Hon. J. B. Campbell, as aforesaid. From the order denying the motion defendants have appealed.

In view of the stipulation above recited

Order affirmed.

MORRISON, C. J., and ROSS, SHARPSTEIN, MYRICK, McKEE, and THORNTON, JJ., concurred.

[No. 6,927.—Department One.]

March 29, 1882.

THE PEOPLE OF THE STATE OF CALIFORNIA v.
THE PACIFIC ROLLING MILLS COMPANY.

HARBOR COMMISSIONERS—WHARFAGE—STREET.—The Harbor Commissioners have no authority to collect wharfage for merchandise landed at a wharf constituting no portion of a street.

ID.—ID.—ID.—Section 2 of the Act of March 28, 1868 (Stat. 1867-8, p. 432) can not be construed to mean that the owner shall be compelled to collect wharfage from himself for the use of his own wharf, and hold the amount thus collected as agent of the Harbor Commissioners.

ID.—ID.—ID.—The provision of the fourth section of the Act of March 30, 1868 (Stats. 1867-8, p. 716), that "nothing in this Act shall be construed to interfere with the collection of dockage and wharfage by the State," is no new grant of power to the Harbor Commissioners. It is simply a precautionary reservation that nothing contained in the Act shall be construed to interfere with the powers of the Harbor Commissioners with respect to collections, as the same are already conferred and defined.

ID.—ID.—ID.—TONNAGE—CONSTITUTIONAL LAW.—(MYRICK, J., concurring.) Whenever the State shall have constructed or acquired wharves in the interest of commerce it may collect wharfage as proprietor for the use of the wharves. To attempt to impose "wharfage" (so-called) in advance of such construction or acquisition would be an attempt to lay a duty on tonnage in violation of Article One, Section Ten, Constitution of the United States.

APPEAL from a judgment for the defendant in the Nineteenth District Court of the City and County of San Francisco. **WHEELER, J.**

W. W. Morrow and J. B. Lamar, for Appellants.

Section 2524 of the Political Code, describes the general boundaries within which the Board of State Harbor Commissioners have jurisdiction, and adds—"And said Commissioners in addition to a general control over said premises, shall have authority to use for loading and landing merchandise, with a right to collect dockage, wharfage and tolls thereon, such portion of the streets of the City and County of San Francisco ending or fronting upon the waters of said bay as may be used for such purposes without obstructing the same as thoroughfares."

By reference to the Act of the Legislature of 1868, enti-

tled, "An Act to authorize the sale and conveyance to the Pacific Rolling Mill Company of certain overflowed lands in the City and County of San Francisco," which is referred to and made a part of this agreed case, it will be seen that "Point A" is at a wharf covering a portion of the northerly three-fourths of block 505.

The second section of said Act provides that "Any wharf or dock built on the aforesaid described property shall be subject to the same laws, rules and regulations as govern other wharves under the supervision of the State Harbor Commissioners." Thus it appears that so far as the merchandise landed at point A is concerned, the tolls provided for in the schedule of the Board are not only chargeable under the general law of Section 2524; but it is a matter of solemn contract—a reservation in the grant. (Statutes of 1867–8, pp. 432–3).

From whom the defendant acquired title to block 506—point C, the transcript does not show. I presume, however, that it derails title from the State through the Board of Tide Land Commissioners under the Act entitled, "An Act to survey and dispose of certain salt marsh and tide lands belonging to the State of California." (Statutes of 1867–8, p. 716.)

If so, the defendants are estopped by a provision contained in Section 3, as follows: "Provided nothing in this Act shall be construed to interfere with the collection of dockage and wharfage by the State."

S. M. Wilson and Wilson & Wilson, for Respondent.

The wharves were erected by the defendant, and have always been in their possession and control. Neither the plaintiff nor the State Harbor Commissioners have ever done anything towards the erection of wharves, or the improvement of the harbor at this point of the bay, and the entire artificial structure used by the defendant has been built at its own cost and expense.

The power of the State Harbor Commissioners is derived from Article ix of Title iv of the Political Code, being Sections 2520 *et seq.* Section 2524 of the Political Code practically places the harbor of San Francisco, for certain purposes, under the control of the State Harbor Commissioners, and

that section and Sections 2522 to 2526, both inclusive, define their powers; and upon their construction and validity depend the solution of the question involved in this case.

The Harbor Commissioners claim the right to collect dockage from all vessels coming into the harbor, according to their tonnage, and whether they may lie at any of the public wharves, landings, slips, or docks built and owned by the State, or at private wharves or landings, or in the open harbor outside of any wharf, landing, slip, or dock. They claim the right to collect from the defendant wharfage and tolls on its own goods landed on its private wharf and property.

The question is not whether the defendant can make collections from vessels lying at its wharf or on goods landed there, but whether the Harbor Commissioners can make such collections from the defendant for its own goods landed there.

The Harbor Commissioners, under their construction of the Political Code, and pursuant to their claim above referred to, have established and imposed on all vessels coming into the port a sum measured by the tonnage of the vessel, and this too, irrespective of the use by the vessel of any wharves, docks, landings, or slips owned or constructed by them.

They have also established a rate of wharfage and tolls applying to wharves, landings, and other places built, constructed, or owned by private individuals, as well as to those built or constructed by the State, and even upon goods landed out in the bay by lighters or other vessels, far removed from the State improvements; and likewise on lumber, timber, and piles thrown out into the water and floated off.

The Political Code as construed by the Harbor Commissioners, is in violation of the Constitution of the United States (Art. i, § 10), which says among other things, that "no State shall, without the consent of Congress, lay any duty of tonnage."

That the charge sought to be collected here is "a duty of tonnage" is plain, from the following cases: (*Cannon v. City of New Orleans*, 20 Wall. 577; *The Steamship Co. v. Port Wardens of Louisville*, 6 id. 31; *State Tonnage Tax Cases*, 12 id. 212; *Peete v. Morgan*, 19 id. 581; *Packet Co. v. Keokuk*, 5 Otto, 80; *Northwestern Union Packet Co. v. St. Paul*, 3 Dillon, 454; *Northwestern Union Packet Co. v. City of St.*

Louis, 4 Dillon, 10; Act of Admission of California, 1 Hitt. Dig. §§ 240-242.)

The Political Code, rightly construed, only intends to authorize the collection of such duties for the use of the improvements, wharves, slips, and docks constructed and owned by the State, through the Harbor Commissioners. It was not intended that vessels not using them should be charged with such duties. Much less were the owners of their own property to be charged for its use.

The COURT:

The proceeding seems to be to recover wharfage for certain merchandise landed at the points marked "A," "B" and "C," on the map attached as an exhibit to the original transcript. The wharves at points "A," "B" and "C" constitute no portion of a street, and the judgment must be affirmed. (*People v. S. F. Gas Co.*, 54 Cal. 248.)

It is said, however, that point "A" is a projection from the northerly three fourths of block 505, of which defendant was permitted to become the owner by the Act of March 28, 1868, (Statutes 1867-68, p. 432) and that the second section of that Act gives power to the Harbor Commissioners to collect wharfage upon any wharf there erected. The second section reads: "Any wharf or dock built on the aforesaid described property shall be subject to the same laws, rules and regulations as govern other wharves under the supervision of the State Harbor Commissioners." We have seen that point "A" is not a portion of any street within the meaning of Sections 2524 and 2525 of the Political Code. Certainly the jurisdiction and power of the Harbor Commissioners are no greater over that point than over the whole structure built by defendant upon the northerly three fourths of block 505. We are then brought to the question, did the Legislature, by the second section of the Act of March 28, 1868, intend that the Harbor Commissioners should collect wharfage of defendant upon coal and iron, landed upon the premises of defendant, to be consumed in the rolling mills, the erection of which constituted a portion of the consideration which induced the Legislature to make the grant of the northerly three fourths of block 505? Whatever else it may mean, the section can-

not be construed to mean that the owner shall be compelled to collect wharfage from himself, for the use of his own wharf, and hold the amount thus collected as agent of the Harbor Commissioners.

It is also urged that defendant must have acquired title to the portion of block 506 of which it has possession (Point "C,") under the Act of March 30, 1868 (Statutes 1867-68, p. 716) and by the fourth section of that Act it is provided: "Nothing in this Act shall be construed to interfere with the collection of dockage and wharfage by the State." This language is no new grant of power to the Harbor Commissioners. It is simply a precautionary reservation that nothing contained in the Act shall be construed to interfere with the powers of the Harbor Commissioners, with respect to collections, as the same are already conferred and defined.

In the same connection, and immediately after the language last above quoted, the statute proceeds: "Nor with the right of the State to construct, adjoining the property granted, such wharves and docks as may from time to time be provided by law," etc. The declaration is, that there is reserved the right to construct new wharves, and, in the meantime, to collect such tolls and wharfage as by law the Commissioners are authorized to collect, without such rights being restricted by anything contained in the Act. Judgment affirmed.

MYRICK, J., concurring :

I concur, for the reasons above given; also for the reason that to give the statute in question the construction claimed by the Harbor Commissioners in this case would be in violation of Article I, Section 10 of the Constitution of the United States: "No State shall, without the consent of Congress, lay any duty of tonnage."

Whenever the State shall have constructed or acquired wharves in the interest of commerce, it may collect wharfage, as proprietor, for the use of the wharves; to attempt to impose "wharfage" (so called) in advance of such construction or acquisition, would be an attempt to lay a duty of tonnage. (*Cannon v. City of New Orleans*, 20 Wall. 577; *Packet Co. v. Keokuk*, 95 U. S. 80.)

[No. 6,981—Department One.]

March 29, 1882.

PAUL ROUSSET v. J. W. REAY ET AL.

EJECTMENT—OUTSIDE LANDS OF SAN FRANCISCO—ORDER No. 866 OF THE BOARD OF SUPERVISORS.—Ejectment for land forming part of the "outside lands" of San Francisco. (Complaint filed Sept. 16, 1873.) The plaintiff deraigned title under deed from the City and County of San Francisco—dated April 5, 1870—issued in pursuance of proceedings taken under Order No. 866 prior to the passage of the Act of April 14, 1870, "*to expedite the settlement of land titles in the City and County of San Francisco.*" (Stat. 1869-70, 353.)

Held: In effect, Order 866 was ratified and re-enacted by the Act referred to. The deeds under which the plaintiff claims were therefore valid.

ID.—FINDINGS—POSSESSION OF DEFENDANT.—The finding of the Court of possession by the defendants was justified by the evidence.

ID.—ID.—STATUTE OF LIMITATIONS—PLEADING.—The defendants pleaded that the plaintiff's cause of action was barred by § 318 and by § 319 of the Code of Civil Procedure, and the Court found "that the plaintiff was and has been at all times since the sixth of April, 1870, seized in fee simple, and the owner of and entitled to the possession of" the lands in controversy; and "that the said defendants had prior to the commencement of this action been in the possession of the said pieces and parcels of land at no time prior to the nineteenth of May, 1870."

Held: If there was a plea of the statute of limitations the finding covered it.

APPEAL by defendants, Peter McGrath and Edward Roper, from a judgment for the plaintiff in the Fifteenth District Court, City and County of San Francisco. DWINELLE, J.

The evidence with reference to the possession of the defendants, at the time of bringing the suit, was substantially as follows: Samuel Crim, defendant, called for plaintiff, sworn:

I am one of the defendants and know the premises described in this complaint, and a deed that has just been offered. I have known it since 1868—about that time; it is part of the property I was put into possession of by the Sheriff in May, 1870. * * * About the time I was put in possession I gave a lease to other parties; the lease is dated May 19, 1870. I remained in possession from that time up—that is, I thought I was in possession up to some time in 1872, or up to the present time. I gave Peter McGrath, defendant and Mallory a lease; they were then at that time in possession. * * *

Q. How long did they remain in possession as your tenants?

A. That is, I consider they remained.

Mr. Seawell.—State what you know and saw.

A. I don't know anything positively about it, except I was under the impression they were in possession up to the present time; in the mean time there was a lease made. I deeded the property, a certain portion of it, to Mr. Roper, defendant, the next day, the next day after the lease.

Plaintiff's counsel here presented to the witness a deed from Samuel Crim to Edward Roper, bearing date the twentieth day of May, 1870, and recorded the fourteenth day of October, 1870, in the Recorder's office of the City and County of San Francisco, by which deed said Samuel Crim granted and conveyed to said Edward Roper all his (Crim's) right, title and interest, in and to the premises described in said lease to McGrath, excepting and reserving blocks 757, 684 and 780. I had placed those folks (McGrath and Mallory) in possession at the time; that is, the deed I gave, or the lease.

Q. Did you ever make any improvement on these three blocks, if so, what were they?

A. Not any, sir; they are enclosed by a fence, I think a three-rail fence, and there were two houses on it the time I was put into possession; they are not enclosed by themselves, they are within the large enclosure.

* * * * *

Q. Is that the same land embraced in that lease?

A. Yes, sir, that is what I understand it to be; of course the lease to Peter McGrath and Mallory, dated May 19, 1870.

* * * * *

Q. Was it fenced when you were put in possession?

A. Yes, sir; at least there was a fence there. * * *

I know Mr. Reilly; he lives within the large enclosure of the land embraced in the lease; the two houses which were upon this larger enclosure were occupied, one by Mr. McGrath, and the other by Mallory, when I put them into possession.

* * * * *

Plaintiff's counsel read in evidence a deed from J. W. Reay and Edward Roper to Samuel Crim, dated the first day of June, 1870, for blocks 757, 684 and 780, acknowledged June 6, 1870, and recorded on the second day of November, 1874.

The Court.—Had you tenants there?

A. Yes; in common with the other property under this lease and the lease by Roper to Wm. McGrath.

Q. You speak of there having been two houses, one of which is burnt, is the other house still standing there?

A. As to the burning I won't be positive, but it was removed any way; that is my impression.

Q. The other house; is it still standing?

A. Yes, sir; on the right hand side of the road; at least it was the last time I was out. I have not been through there within the last month or so.

Q. It has been standing there ever since you went into possession in 1870?

A. Yes, sir.

Q. You say the McGrath house stood on the right hand side?

A. On the right hand side as you are going out.

Q. Who was occupying it the last time you were there?

A. Mr. McGrath.

The Court.—Q. Peter McGrath?

A. I saw him there; yes, sir.

Mr. Harrison.—Q. When was that?

A. Well, probably. Probably something over a year ago; it might have been inside of that time; that is, I saw him at the house; that is, he was outside and spoke to me; I stopped and talked with him a few minutes. Whether or not he was occupying the house I do not know, no more than he was there during that time.

Q. Who else did you see there?

A. I cannot say I saw any one just at that time; no doubt that his family was there.

* * * * *

Q. Have you paid the taxes upon those three blocks?

A. Yes, I judge we have paid the taxes on the most of it; we did not on all of it.

The Court.—Q. At what time?

A. At the regular time.

Q. Up to the present time?

A. Oh, yes, up to the present time, we have paid our taxes regularly every year; that is, on the three blocks, at least our

proportion, other parties claiming it may have paid it on their portion.

* * * * *

Q. You said that the property you were put in possession of by the Sheriff was known as the Elsesser Tract?

A. Yes, sir; it was purchased by John Treat (defendant); he kept a milk ranch there before; that is, Treat and I together purchased; I had an interest in it and he had one. Treat made the purchase of this property in 1868. He and I were joint purchasers of the tract. He owned, say two thirds of it. I was interested with him and furnished the money, and the tract was deeded to me. It never stood in his name, but he owned two thirds of it.

I wish to make an explanation of my testimony where I stated I had tenants there in common with other property under this lease. What I meant by that is, it was held in one tract. When I passed the deed to Roper I did not have any control over that portion of the land at all; did not have any interest whatever in it. What I meant by in common is that the parties holding for Roper had charge of my three blocks when I made the remark "common." I meant the parties holding for Roper were keeping possession of my three blocks.

CROSS-EXAMINATION.

Q. You say that the parties holding for Roper were to keep possession of your three blocks?

A. Yes, sir.

Q. That is, the whole of the property was to be in a common enclosure?

A. That is the possession as far as the possession is concerned; the parties holding possession for them were to hold possession of my three blocks.

Q. That land was, as you stated, held in common?

A. What I meant by that was, held under one fence; there was no separate enclosure, is what I meant by that. I never had anything to do with the rest of that property since that deed; I made no claim to it, none whatever, except the three blocks. I state now, under oath, that is all the interest I had in it; those three blocks.

Plaintiff's counsel offered and read in evidence a lease from Edward Roper to William McGrath, dated December 31, 1872.

* * * * *

Peter McGrath, called for defendants, sworn.

Mr. Seawell.—Please look at that [handing witness the lease from Samuel Crim to Peter McGrath and Thomas Mal-lory] and see whether you executed it?

A. Yes, sir.

Q. What did you do after this lease in reference to the property?

A. I lived there; I lived on one side and kept my stable on the other.

Q. Was it all within one enclosure?

A. Well, there is a road runs between the two enclosures, but it is all in one enclosure, I think.

Q. How long did you remain there?

A. I stopped there till 1871; the latter part of 1871; I changed my residence then up to Napa. The latter part of 1871 I came back, and went away again in 1872, and stopped there till September, 1873.

Q. What did you do, if anything, with reference to this property before you left in 1872?

A. I lived there. I was a tenant of Mr. Crim. I lived there and stabled my horse and raised a little vegetables.

Q. When you left did you make any arrangement about the property?

A. I think I was away from it two years.

Q. Were you there all the time or a part of the time, in Napa, from 1872 to 1873?

A. I was there all the time; I had steady work; I was superintendent of the mine in Pope Valley; changed my papers and voted up there; paid my poll tax and road tax up there; I have got the receipts here for them.

* * * * *

Q. You came back in September, 1873?

A. Yes, sir, the tenth, or eleventh, I believe; I went up the beginning of 1872. I was pretty near two years there altogether in Pope Valley, at the Quicksilver Mines, as Superintendent. When I came back I went out on the ranch.

Q. What do you mean by that?

A. On the land in dispute.

Q. To the place you had been living before?

A. Yes, sir.

Q. Have you resided there ever since?

A. Yes, sir.

Q. Is that property still in one enclosure, still the same enclosure that was there when you first went there?

A. No; there have been some alterations in it, lately.

Q. Until within the last year, has it remained in about the same condition?

A. About the same.

Q. How much of a family have you living there now?

A. I have two—two sons—William, who is thirty years old, and Peter who is nineteen; neither of them is married. I have a wife living with me there, the mother of these sons. My daughters are not living with me now, one is in Sacramento, and the other in San Francisco, she left the place shortly after I left. They were not there when I came back. I left them there when I went away. I left my wife there also, when I went to Napa, and I found her there when I got back. She lived with her son there. I am living in the same house I went to in 1868, and have resided there since, and my wife.

Q. Your wife you found there when you got back, did you not?

A. Yes, sir; she lived with her son there. I have not seen Mallory for seven or eight years.

William McGrath, called for defendants, sworn:

I am the son of the last witness.

Q. Please look at that paper, and tell if it was signed by you? [Handing witness lease from Roper to him.]

A. Yes, sir, and by Edward Roper, in 1872.

Q. What did you do with reference to the property after the execution of the lease?

A. I fixed up the fences and I kept them up in good repair; and lived on the property, and have lived there since 1868 to the present time, and kept a horse and two cows.

Q. Did you occupy it exclusively, or was there somebody else with you?

A. I occupied that with my mother. I was living there with her and my sister.

* * * * *

Q. How much rent did you ever pay under this lease?

A. I have not paid any yet.

Q. Were you ever asked to pay it?

A. No, sir. This lease was made after my father went to Napa.

Q. Are you married?

A. No, sir; never have been married.

Q. Who was the housekeeper out there?

A. Mother.

The Court.—Q. While your father was in Napa?

A. Yes, sir.

Mr. Harrison.—Q. She had charge of the management of the house, did she?

* * * * *

Q. The furniture remained there, however?

A. Yes, sir.

Q. That is your father's furniture?

A. Yes, sir; I don't think he has got much of it.

Q. What?

A. I don't think it belongs to him.

Q. It is not yours, is it?

A. No; I think it is mother's.

Q. How often did your father visit you during the time?

A. He used to come down about once a month or twice.

Q. He used always to go there to stay, did he not?

A. Yes, sir.

* * * * *

Defendant's counsel offered and read in evidence a deed of the land in controversy from Edward Roper to Alfred W. Reay, dated March 8, 1873.

J. M. Seawell, for Appellants.

The deeds from Selby (Mayor) to plaintiff and to Slater, respectively, did not convey any title to the grantees.

The deed to plaintiff bears date April 5, 1870. It recites that plaintiff filed his petition November 23, 1869, and that all the proceedings were had under and by virtue of Order

No. 866 of the Board of Supervisors. Order No. 866 was an order of the Board of Supervisors, passed April 29, 1869, providing the means of acquiring deeds from the city. It was never authorized by the Legislature, and it was never ratified by the Legislature. Without such ratification the Board of Supervisors had no power to legislate upon the subject. By the Act of Congress of March 8, 1866, the land was granted to the city in trust to convey the same to the parties then in possession, in such quantities and upon such terms and conditions as the Legislature should prescribe. It was, therefore, not for the Supervisors, but the Legislature, to give directions upon the subject. Accordingly, by the Act of March 24, 1870 (Statutes 1869-70, 353), power was for the first time conferred by the Legislature upon the Mayor and Board of Supervisors to determine who were the beneficiaries under the Act of Congress, and to execute a deed to them. Section 6 of that Act provides that proceedings instituted under Order No. 748 of the Board of Supervisors may be continued under the provisions of said Order No. 866, and that when the proceedings have been completed and the Committee on Outside Lands of the Board of Supervisors have executed a deed, the grantee may obtain a deed from the Mayor, without further petition or proof; but the section cited does not apply to proceedings wholly begun, continued, and ended under Order No. 866.

The deeds from the Mayor having been executed without authority of law, their validity may be impeached collaterally in an action of ejectment. (*McGarrahan v. New Idria Mining Co.* 49 Cal. 335; *Parker v. Duff*, 47 Cal. 562, and cases cited.)

Neither of the appellants were in possession of any part of the premises sued for at the time of the commencement of the action. The following is the history of the occupation of said premises as shown by the evidence:

On the eighteenth of May, 1870, Samuel Crim was put in possession by the Sheriff of a tract of land called the Elsassor Tract, containing between 90 and 100 acres. The demanded premises are a part of this tract. The next day, May 19, 1870, Crim made a lease of the premises to Peter McGrath and one Mallory for the term of six months. These lessees

were at the time in possession of the property. The following day, May 20, 1870, Crim executed a deed to the appellant Roper of the entire tract, except Blocks 757, 684 and 780. Mallory does not appear to have remained on the premises. Peter McGrath, the other tenant, remained there until the beginning of the year 1872, when he went to Pope Valley, in Napa County, to live. He remained there until some time in September, 1873. This action was commenced June 5, 1873. On the thirty-first of December, 1872, Edward Roper executed a lease of the premises to William McGrath, a son of Peter. At that time Peter was superintendent of a quicksilver mine in Pope Valley. William McGrath has, ever since the execution of the lease to him, continued in possession of the premises. He, and not Peter, was in possession at the time when this action was commenced, in June, 1873. It is not pretended by counsel for respondent that Peter McGrath was on the premises when this action was commenced, or that he was not living in Pope Valley, or that he was not superintendent of the quicksilver mines for nearly two years, from the beginning of 1872 to September 1873; but it is claimed by them that, notwithstanding Peter's absence from the premises—notwithstanding the fact that his son, William, then in the twenty-sixth year of his age, was occupying the premises under a lease from Edward Roper, he, Peter McGrath, was still in possession, ousting the plaintiff and preventing him from taking possession of the property.

There is no evidence that Roper was ever in possession of the premises. His only connection with the property is that he received a deed from Crim of the premises, except blocks 757, 684, and 780, and executed the lease to William McGrath in December, 1872. On the eighth of March, 1873, and three months before the commencement of this suit, Roper conveyed his interest in the premises to Alfred W. Reay.

If the deed to Roper was sufficient to put him in the constructive possession of the premises, the deed from him to A. W. Reay was sufficient to put him out again. As landlord of William McGrath he is not sued. Section 379, C. C. P., provides that "in an action to determine the title or right of possession to real property, which at the time of the commencement of the action is in the possession of a tenant,

the landlord may be joined as a party defendant." In such a case the allegation should be that the tenant-defendant is in possession, and that the other defendant is his landlord. An allegation that the landlord is in possession is not enough, for it is not he, but the tenant, who is in possession. Besides, when Roper conveyed to Reay on the eighth of March, 1873, he ceased to be landlord.

The judgment should be reversed for the failure of the Court below to find upon the issue raised by the plea of the statute of limitations. The only finding tending to cover that issue is the fourteenth, "and the said defendants had, prior to the commencement of this action, been in the possession of the said pieces and parcels of land at no time prior to the nineteenth day of May, 1870." This is no finding upon the issue. It does not find that the grantors of defendant had not been in possession prior to May 19, 1870, or that plaintiff or his grantors had been in possession within five years before the commencement of the action.

J. H. Smyth, for Respondent.

The first error assigned is the admission of the deed from the city to the plaintiff.

After the Act of March 8, 1866, various orders were adopted by the municipal authorities of San Francisco for carrying its purposes into effect, among others Order No. 800, which was ratified by the Legislature, (Stat. 1867-8, p. 379) and Order No. 866, which was reenacted by the Legislature (Stat. 1869-70, p. 353). By the former of these orders it was provided (Sec. 11) that upon certain events the title (without any conveyance) was released to the person named in the Act of Congress, and it was further enacted by the Legislature that "all proceedings heretofore had and which have taken place, or shall hereafter take place, under its provisions are ratified and confirmed."

And by the Act of March 14, 1870, all orders conflicting with Order No. 866 are repealed, but it was expressly declared (Sec. 6) that "such repeal shall not invalidate any of the proceedings instituted under the Order of which No. 866 is amendatory;" and also (Sec. 5), "that a conveyance exe-

cuted in pursuance of the provisions of this Act shall operate as an acknowledgment that the title to the land has passed under and by virtue of the Order No. 800."

The recitals in the deed in question show that it was a portion of the "proceedings instituted under" Order No. 866, and also that it was executed "in confirmation of" the provisions of Order No. 800, and consequently is within the operation of both of the aforesaid Acts of the Legislature.

The motion for a nonsuit was properly denied by the Court.

The motion was made upon the ground that "none of the defendants were in possession or shown to have been in possession at the time of the commencement of this action."

It was not necessary to show an actual personal occupancy of the land in order to entitle the plaintiff to recover. A constructive possession is sufficient. And if a person asserts that he is in possession, or does such acts as imply that he is in possession, or claims to be in possession, or such acts as are inconsistent with a denial of such possession, he is said to have constructive possession, in the same manner that a denial of plaintiff's title is regarded as equivalent to proof of an ouster. (*Crane v. Ghirardelli*, 45 Cal. 235.)

Kindred to the foregoing point is the specification in the statement that the evidence was insufficient to show that the defendants were in possession of any portion of the premises at the commencement of the action. They endeavored to show that because McGrath happened to be in Napa on the day the complaint was filed therefore he was not then in possession of the land.

The Court, however, was satisfied from the evidence on that subject that the pretended change of possession from McGrath to his son was a fraudulent and simulated one, and that, in fact, his possession was continuous from the date of his entry under the lease, in May, 1870, to the time of the trial. The finding of the Court upon the conflict of evidence on this issue is conclusive on the point. (*Ellis v. White*, 47 Cal. 75.)

As was said by this Court, upon a similar attempt by a father to abandon his possession in favor of his son who was living with him, "Courts would cease to be courts of justice

if such proceedings were countenanced." (*Keller v. Berry*, 6 P. C. L. J. 864.)

The finding that the plaintiffs have been seised in fee and the owners of the premises since the sixth day of April, 1870—the action having been brought in 1873—is a sufficient finding on the issues of the statute of limitations. (C. C. P. § 321; *S. F. v. Fulde*, 37 Cal. 349.)

It will be noticed that the answer only pleads the provisions of Sections 318 and 319 of the Code of Civil Procedure, which in no way refer to any possession by the defendants; and in the absence of any allegation on that point, it was unnecessary to find thereon.

Ross, J.:

The lands in controversy in this action, and in a number of other actions now pending before us, form a part of what was known as the "outside lands" of the City and County of San Francisco. After the passage of the Act of Congress of March 8, 1866, in relation to those lands, the Board of Supervisors passed, among other orders, Order No. 866, by which provision was made for the presentation of petitions by the respective claimants, the making of proofs, the making and publication of awards of the land, to be followed by deeds by the Mayor. It is contended on behalf of the appellants that this Order—No. 866—was never authorized or ratified by the Legislature, and that, as a result, the deeds issued by the Mayor pursuant to its provisions were unauthorized and void.

. In effect Order 866 was ratified and re-enacted by the Act of the Legislature approved March 14, 1870. (Statutes 1869-70, p. 353.) By the first, second, third, fourth and fifth sections of that Act the order was substantially re-enacted, and by the sixth section the Legislature repealed all Orders and parts of Orders of the Board of Supervisors conflicting with Order 866, accompanying the repeal, however, with the proviso that such repeal should not invalidate any of the proceedings instituted under the Order of which Order 866 was amendatory, and expressly authorized such proceedings to be continued under the provisions of said Order 866. This was in effect a legislative ratification of the provis-

ions of Order 866, for it can not be held that the Legislature intended to authorize any proceedings to be conducted under an unauthorized or invalid Order. Besides the whole scope of the Act of March 14, 1870, manifests the intent on the part of the Legislature to ratify and continue the provisions of Order 866. The intent is manifested, in the first place, by the repeal of all Orders and parts of Orders in conflict with it, with the saving clause that all proceedings instituted under the Order of which it was amendatory should be unaffected by the repeal and be *continued under its provisions*; and, in the second place, by the *re-enactment* in statutory form of the provisions of the said Order.

Our conclusion is, that the deeds under which the plaintiff claims were not unauthorized, and that they were properly admitted in evidence. (*McCreery v. Sawyer*, 52 Cal. 257; *Le Roy v. Cunningham*, 44 id. 609; *Kraft v. Driscoll*, 1 P. C. L. J. 24.) We have looked into the evidence, and cannot say the findings of the Court of possession of the premises by the appellants at the time of the commencement of the action, was not justified. As respects the finding in relation to the statute of limitations, it is sufficient to say that if there was a plea of the statute, the finding covered it.

Judgment and order affirmed.

MCKINSTRY and MCKEE, JJ., concurred.

Paul Rousset et al. v. J. W. Reay et al., No. 6984; *Theodore Lieberman v. J. W. Reay et al.*, No. 6983; *Simon Held v. J. W. Reay et al.*, No. 6984; *William Thurmauer v. J. W. Reay et al.*, No. 6985; *E. S. Freeman v. J. W. Reay et al.*, No. 6986; *William J. Adams v. J. W. Reay et al.*, No. 6987; *J. M. Forrest v. J. W. Reay et al.*, No. 6988; *Patrick F. Butler v. J. W. Reay et al.*, No. 7282; presenting the same points and argued by the same counsel as *Rousset v. Reay* (No. 6891) *supra*, were affirmed on the authority of that case.

[No. 8,059.—In Bank.]

March 30, 1882.

NEWTON MORGAN v. STEWART MENZIES ET AL.

UNDERTAKING ON ATTACHMENT—CITY AND COUNTY—CITY.—Section 1058, C.

C. P.—providing that no bond, written undertaking or surety can be required of the State or the people of the State, or any state officer in his official capacity, or “*any County, City or Town*” in any civil action or proceeding in which they are parties, etc.—applies to the City and County of San Francisco.

ID.—ID.—ID.—DEFINITION.—The term *City* includes in its signification *City and County*.

ID.—ID.—ID.—COMMON LAW BOND—ILLEGAL CONSIDERATION—POLICY OF THE LAW.—An attachment undertaking given by the City and County in a suit in which it is plaintiff, is in contravention of the policy of the law, and therefore void as a common law bond.

ID.—BREACH OF CONDITION—PLEADING—SURETIES.—In an action against the sureties in an undertaking, the condition of the undertaking was that if the defendant recovered judgment the plaintiff would pay all costs that might be awarded to the said defendant, and all damages which he might sustain by reason of said attachment, not exceeding, etc.; but there was no averment in the complaint that the plaintiff had not paid, or even that a demand had been made.

Held: The complaint was fatally defective. The breach of the contract being obviously an essential part of the cause of action must in all cases be stated in the declaration; and the omission to allege a breach can not be aided or cured even by verdict.

APPEAL from a judgment for the plaintiff and from an order denying a new trial in the Superior Court of the City and County of San Francisco. WILSON, J.

W. C. Burnett and E. E. Haft, for Appellants.

The language of the undertaking is, that the City and County of San Francisco shall pay all damages, and is in effect but a conditional contract to pay if the city does not. As the able counsel for respondent said, upon the argument, “they agreed to pay if the city didn’t.”

It therefore imposes necessary precedent obligations upon the plaintiff—

1. That the city shall be placed in such a condition that it can lawfully pay.

2. That such obligation being fulfilled, it be requested to pay or its refusal alleged.

1. *Pierce v. Whiting*, 63 Cal. 542.

3. That it shall appear by the complaint that it has not been paid.

By the Statutes of 1863-64, pages 152, 153, all demands against the city and county must be presented to the Board of Supervisors within one year, and until such presentation is made the city can not pay. Such claim could only be presented by Newton Morgan, the plaintiff. His neglect to do so is a neglect to put either principal or surety in default. The principal, because it prevented him from paying, and the surety because he was only obligated in default of the principal. His failure to do so for one year operated as a bar in favor of the city and put it out of its power to make default, and as a logical consequence operated as a bar in favor of the sureties.

The principal not having been in default, the guaranty was not broken, and an action could not be maintained against the sureties. (De Colyer on Guaranties and Principal and S. 215, 216; Brandt on Sureties and Guaranties, Secs. 1, 82 and 83.)

The principal was never put in default. The time had expired before the commencement of the action in which the principal could have been put in default or proceedings taken against it, and the claim was barred against the principal. (*Parnell v. Hancock*, 48 Cal. 452; *Pinney v. Hershfield*, 1 Montana, 367; *Holcomb v. Foxworth*, 34 Miss. 266; *Sledge v. Lee*, 19 Ga. 411; *Goodman v. Allen*, 8 La. Ann. 381; *Ferry v. Burchard*, 21 Conn. 597; *Ohio v. Blake*, 2 Ohio State Rep. 147; *Farmers' etc. Bank v. Kingsley*, 2 Doug. (Mich.) 379; *Stull v. Davidson*, 12 Bush, (Ky.) 167; *Evans v. Raper*, 74 N. C. 639; *Blackburn v. Beall's Exec't'r.*, 21 Md. 208; Burge on Suretyship, 3, 6.)

The undertaking on attachment on which this action is based was taken without authority and contrary to law, no undertaking being required of the City and County. (C. C. P. § 1058.) We therefore claim that the undertaking is void. (*Benedict v. Bray*, 2 Cal. 251; *Caffrey v. Dudgeon*, 38 Ind. 512; *Byers v. The State ex rel. Hutchison*, 20 Ind. 47; *Thompson v. Lockwood*, 15 Johns. 256.)

Although Sec. 1058 does not in exact language exempt the

City and County, yet by a reasonable and fair construction it must be intended to include it.

We admit, that where the statutes authorize the taking of a bond upon attachment, though the formalities in the preparation of the bond may not have been pursued, the bond may be good as a common law bond. But we maintain that if a bond is unauthorized or forbidden by law, the bond taken will be void as to the sureties. The cases with perhaps one exception cited by the respondent, only go to the effect that a bond authorized by law will be good as a common law bond, though the formalities of the statutes are not pursued in the preparation thereof. This exception is the case of *Barnes v. Webster*, 16 Mo. 259.

This old case may be construed to maintain that a bond not authorized by law is yet good as a common law bond. It seems to stand alone on this question. That it was an ill considered case is evident from the language quoted from it by the counsel for the respondent: "It was needless to cite authorities to support that proposition."

G. F. & Wm. H. Sharp, for Respondents.

Appellants are undoubtedly sureties as to the City and County of San Francisco, but as to respondents, they are principals. The undertaking as between the parties to it is an original contract. (*Frankel v. Stern*, 44 Cal. 168; *Curtis v. Richards*, 9 id. 33; *Murdock v. Brooks*, 38 id. 604; *Aud v. Magruder*, 10 id. 288-9; *City of Sacramento v. Dunlap*, 14 id. 423 (last section).)

Independent of authority, this must necessarily be so, on principle. Before the relation of guarantor or surety could exist as to Morgan, he must have a cause of action alike against both principal and guarantor or surety, and his cause of action must be identical, involving *equal right* and *equal damages*, with the right or election to proceed against the one or the other.

The City and County not being a party to the undertaking, is not obliged to respond under it, and could not be sued by respondent on it.

Hence we say, that a cause of action arises at once against appellants, as principals, on their undertaking upon a recov-

ery of a judgment by respondent. (*Brown v. Brown*, 7 Ind. Rep. 485; *Abercrombie v. Knox*, 3 Ala. Rep. 728; Baylies on Suretyship, § 12, pp. 24, 111-12.)

If the undertaking be, as claimed by appellants, a contract of guaranty, they would be in no better condition. (C. C. §§ 2806, 2807, 2808, 2810 and 2837.)

If a guaranty at all, it is an absolute one; and that being the case, guarantor not entitled to demand of payment or notice of failure to perform his obligation. (*Voltz v. Harris*, 40 Ill. 155; *Dickerson v. Derrickson*, 39 id. 574; *Vinal v. Richardson*, 13 Allen, 521.)

Respondent claims and insists that the contract of appellant is a contract of indemnity. (C. C. §§ 2780, 2772; *Christ v. Burlingame*, 62 Barb. 351; *Canfield v. Bates*, 13 Cal. 606; *Baker v. Cornwall*, 4 id. 15; *McMillan v. Dana*, 18 id. 339; *Doughty v. Neal*, 1 Saund. 216 and note; *Mounsey v. Drake*, 10 John. 25.)

If an obligor undertakes for the act of a stranger, he must procure the act to be done, or do it himself. He can not require the obligee to assume any part of the burden that he has made his own. (*Hesketh v. Gray*, 1 Sawyer, 185; *Villars v. Palmer*, 67 Ill. 204; *McKecknie v. Ward*, 58 N. Y. 541.)

A demand on the City and County was not necessary before suit against appellants upon their undertaking. (Brandt on Suretyship, 244, and cases cited; Baylies on Suretyship, 202 and 205, and cases cited; Civil Code, § 2823; *Browner v. Davis*, 15 Cal. 11; *Murdock v. Brooks*, 38 id. 604; *Churchill v. Abraham*, 22 Ill. 455; *Bruce v. Coleman*, 1 Handy, Ohio, 515; *Smith v. Eakin*, 2 Sneed. Tenn. 456; *Herndon v. Forney*, 4 Ala. 243; *Dickinson v. McGraw*, 4 Rand. Va. 158.)

If we had a claim against City and County, and it was barred, immaterial in suit against appellant on their obligation. (*Reeves v. Pulliam*, 4 Law and Eq. Reporter, 331; *McBroom v. Governor*, 6 Port. Ala. 32; Civil Code, § 2810; Brandt on Suretyship and Guaranty, § 392, and cases cited in note; *U. S. v. Sturges*, 1 Paine, 525; *Hunt v. U. S.*, 1 Gall. C. C. 32; *Phillips v. Solomon*, 42 Ga. 192; 5 Waits' Actions and Defenses, 85.)

Now it is required to aver non-payment by the City and County. Payment is a matter of defense. If unnecessary to

allege demand, it is certainly unnecessary to allege refusal to pay, especially as the appellants claim that the City and County could not pay until demand had been made upon claim presented to Board of Supervisors. (*Douglass v. Howland*, 24 Wend. 35; *Heebner v. Townsend*, 8 Abb. Pr. 234; *Noyes v. Nichols*, 28 Vt. 159; *Gage v. Lewis*, 68 Ill. 604.)

The City and County was in default when the judgment in the attachment suit was affirmed.

If Morgan ever had a cause of action against the City and County, it was for issuing an attachment maliciously, and without probable cause; and he could have commenced action when the judgment was affirmed. (*Parnell v. Hancock*, 48 Cal. 452; *De Colyer on Guaranty*, 61, 216.)

When the attachment in suit of *City and County v. Morgan* was issued (Sept. 1874) no statute existed exempting a City and County from giving an undertaking on attachments. Section 1058 C. C. P. was not amended until 1880 as to a "City and County" not being required to give the statutory undertaking in such cases.

An undertaking (not a statutory one) founded on a sufficient consideration is valid as a common law obligation. (*Palmer v. Vance*, 13 Cal. 553; *Dore v. Covey et al.* 13 id. 502.) Though a bond or undertaking is neither authorized or required by statute, not being against public policy, or violating a statute, it is valid on the obligors. (*Brandt on Suretyship*, §§ 15, 16 and 17; *Barnes v. Webster*, 16 Mo. 259; *Morse v. Hodsdon*, 5 Mass. 316; *Sheppard v. Collins*, 12 Iowa, 578; *Toland v. Sprague*, 12 Pet. U. S. 300; *Levy v. Fitzpatrick*, 15 Pet. U. S. 167.)

Having held the property under the attachment, the law estops the obligors from saying their contract was a *nudum pactum*. (*Hathway v. Davis*, 33 Cal. 161; *U. S. v. Bradley*, 10 Pet. U. S. 343; *Morse v. Hodsdon*, 5 Mass. 314; *Sumpter v. Wilson*, 1 Ind. 145.)

In the case at bar there is not a substantive defense set up in the answer. To same effect: *Sherry v. Foreman*, 6 Blackf. 56; *Speake v. U. S.*, 9 Cranch, 28; *Hazelsrigg v. Donaldson*, 2 Met. (Ky.) 445.

If demand, non-performance, or validity of undertaking are conditions precedent, they must be pleaded. They are

not. Not being plead, they are cured by judgment. In *Happe v. Stout*, 2 Cal. 461, held: "where complaint stated a condition precedent, and failed to aver performance, the defect must be taken advantage of by demurrer in Court below. It is too late to urge such defect after verdict." (*Hentsch v. Porter*, 10 Cal. 535.)

No demurrer being interposed to the verified amended complaint, all defects, if any, in the complaint, are cured by the trial and judgment, except that it does not state facts showing sufficient to constitute a cause of action against appellants or either of them.

An analysis of the complaint will show that every allegation required under the foregoing authorities was properly pleaded.

MORRISON, C. J.:

The first question presented in this case, upon which it will be necessary for us to express an opinion, is the following: Were the sureties liable on the undertaking sued on?

The City and County of San Francisco commenced an action against Morgan to recover a certain amount of money which, it was claimed, he owed the plaintiff in that action, and procured a writ of attachment to be issued, which was levied on shares of mining stock, the property of Morgan. Before the writ was issued, defendant Menzies and one Ashbury (since deceased), executed an undertaking in the form prescribed by the statute, concerning attachments. The case of the City and County of San Francisco against Morgan terminated adversely to the City and County, and the case we are now considering was the result.

The undertaking is in the sum of fifteen thousand dollars, and the judgment in the Court below was for that amount against the sureties on the undertaking. From that judgment, as well as from an order denying a motion for a new trial, this appeal is prosecuted.

At the time the undertaking sued on was executed, Section 1058, C. C. P., read as follows; "In any civil action or proceeding wherein the State or the people of the State is a party plaintiff, or any State officer, in his official capacity, or on behalf of the State, or any county, city or town, is a party

plaintiff or defendant, no bond, written undertaking or security can be required of the State, or the people thereof, or any officer thereof, or of any county, city or town; but, on complying with the other provisions of this Code, the State, or the people thereof, or any State officer acting in his official capacity, have the same rights, remedies and benefits as if the bond, undertaking or security were given and approved as required by this Code."

It is claimed that the foregoing section does not apply to the City and County of San Francisco, because that form of consolidated government designated and known as a city and county is not mentioned in the statute. It would be unfortunate if Section 1058 required such a construction. But it does not, as was substantially held in the case of *The People v. Hoge*, 55 Cal. 612. The Court in that case had under consideration Section 8 of Art. xi of the new Constitution, which provides that any city containing a population of more than one hundred thousand inhabitants may frame a charter, and it was held applicable to the City and County of San Francisco. Again, Section 2920 of the Political Code speaks of the City and County of San Francisco in the first part of the section, and in the latter part thereof refers to it as a city or town; and by Section 3901 of the same Code it is declared that "A county is the largest political division of the State, having corporative powers." The Court decided in *Knox v. Woods*, 8 Cal. 545, that "an account audited against the City of San Francisco but not paid at the time the Consolidation Act went into effect, need not again be audited to entitle it to payment."

There is nothing in principle or reason that should exempt the City and County of San Francisco from the operation of the section referred to. It constitutes one of the largest political subdivisions of the State, possessing and exercising all the powers of a county government, and is as much such a government as any county in the State. We, therefore, feel no hesitation in asserting that the City and County of San Francisco is embraced in Section 1058 of the Code of Civil Procedure. To entitle it, therefore, to an attachment against the property of Morgan it was only required to file the complaint and affidavit prescribed by the Code of Civil Procedure,

and thereupon it became the duty of the Clerk to issue the writ. The undertaking filed in the case was not, therefore, a statutory undertaking.

But it is contended, on behalf of respondent, that it was as good as a common law bond. We are familiar with the cases which hold that a voluntary bond may be binding as a common law obligation, in the absence of any statute requiring the execution of a bond. In *Sheppard and Morgan v. Collins*, 12 Iowa, 570, the Court says: "Nor does it follow that a bond is necessarily invalid, though not authorized by statute. It will be good as a common law bond, when it does not contravene public policy nor violate a statute, and be binding on the parties to it." To the same effect and in almost the same language, is the case of *Barnes v. Webster*, 16 Mo. 258.

But it is unnecessary for us to multiply authorities upon this point, as the undertaking in this case, was, in our opinion, against the policy of the law. The policy of the law requires that the State shall be allowed to sue out an attachment without giving a bond or undertaking, and the Code has placed the city and county upon the same footing. There was no authority in the officer (the Clerk) to take the bond, but, on the contrary, it was his duty to issue the writ without it; there was no consideration for the undertaking, it was given in contravention of the policy of the law, and was therefore void. (See *McCoy v. Briant*, 53 Cal. 247; *Dillon's Municipal Corporations*, Sec. 447.)

Second—But there is another defense presented by the record which is equally fatal to the maintenance of plaintiff's action. The conditions of the undertaking is, that "we, the undersigned residents of the City and County of San Francisco, in consideration of the premises and of the issuing of this attachment do jointly and severally undertake in the sum of fifteen thousand dollars, and promise to the effect that if the said defendant recovers judgment in said action, the said plaintiff will pay all costs that may be awarded to the said defendant and all damages which he may sustain by reason of said attachment, not exceeding the sum of fifteen thousand dollars, together with a reasonable attorney's fee."

It will be observed that the undertaking on the part of the defendants is that the *plaintiff* in the action will pay, and

there is no averment in the complaint that it has not paid, or that even a demand has been made. There is not, therefore, any averment in the complaint of a breach which would give the plaintiff in this case a right of action against the defendants on the undertaking. "The breach of the contract being obviously an essential part of the cause of action, must in all cases be stated in the declaration." (Chitty on Pleading, 332; 1 Saunders on Pleading and Evidence, 216); and the omission of a breach cannot be aided or cured even by verdict. (1 Chitty on Pleading, 327.)

Judgment and order reversed,

SHARPSTEIN, MYRICK, MCKEE, ROSS, and THORNTON, JJ., concurred.

[No. 6,667.—In Bank.]

March 30, 1882.

THE PEOPLE OF THE STATE OF CALIFORNIA v.
SAN FRANCISCO GAS LIGHT COMPANY.

HARBOR COMMISSIONERS—DOCKAGE—WHARFAGE—TOLLS—STREETS.—The State Board of Harbor Commissioners has no authority to collect dockage, wharfage or tolls upon any wharves that do not constitute a portion of a street, ending or fronting upon the waters of the bay.

Id.—Id.—Id.—Id.—Id.—DEFINITION.—Section 2524, Pol. C., refers to "streets" which are "thoroughfares;" and not to streets covered by water.

APPEAL from a judgment for the defendant.

The points involved and the argument in this case are substantially the same as in case No. 6676, reported *infra*.

J. B. Lamar and W. W. Morrow, for Appellant.

Clement, Osment & Clement, for Respondent.

MCKINSTRY, J.:

The State Board of Harbor Commissioners can collect dockage, wharfage and tolls only at such places as the statute may authorize. It is clear the present action cannot be maintained if the Harbor Commissioners are not authorized by

1. *People v. S. F. G. L. Co.*, 60 Cal. 358; *Soule v. Pope*, 60 Cal. 669.

the statute to collect wharfage, etc., at the Gas Works (Potrero) Wharf.

Our attention has not been called to any provisions of the Political Code which are claimed to empower the Board to collect dockage, wharfage, or tolls at the wharf mentioned, other than those contained in Sections 2524 and 2525.

Section 2524 provides that the Harbor Commissioners in addition to a "general control" over the premises therein described, "shall have authority to use for loading and landing merchandise, with the right to collect dockage, wharfage and tolls thereon, such portion of the streets of the City and County of San Francisco, ending or fronting upon the waters of said bay, as may be used for such purpose, without obstructing the same as thoroughfares." And Section 2525: "The Board of State Harbor Commissioners are authorized to extend any of the streets lying along the water front of said city and county to a width not exceeding one hundred and fifty feet, when they have not been already so extended. The outer half of said streets must be constructed or built, and maintained in good repair, by the State Harbor Commissioners, or the parties holding under them, and may be used as a landing place or pier on which dockage, wharfage and tolls may be collected. And until such extensions are made the Commissioners may have and use as a landing place, with full power to collect dockage, wharfage and tolls thereon, so much of the *streets*, now fronting upon the water front, as may be used for such purpose, without obstructing the same as a thoroughfare, etc.

Section 2524 refers to "streets" which are "thoroughfares," and not to streets covered by water—*roadsteads* or otherwise. The authority conferred on the Board is to permit the use of the streets for loading and landing merchandise (charging wharfage, etc.), but the "street" on which the goods are *landed*, is not to be obstructed as a *thoroughfare* by the merchandise thus landed.

The meaning of Section 2525 is equally unambiguous. By it the Board is empowered "to extend" or make wider by *constructing or building* the outer half of streets "lying along the water front." Until the extensions are made the Commissioners may have and use as a *landing place*, with power

to collect, etc., "so much of the *streets* now *fronting upon the water front*" as may be so used without "obstructing the same as thoroughfares."

The case before us fails to show that the Gas Works (Potrero) Wharf constitutes any portion of a street or thoroughfare ending at or fronting on the water, but, on the contrary, that it is an isolated projection, which is approachable (except by water-craft) only from private property in the rear.

Judgment affirmed.

MYRICK, ROSS, and SHARPSTEIN, JJ., concurred.

THORNTON, J., dissented.

[No. 6,676.—In Bank.]

March 30, 1882.

THE PEOPLE OF THE STATE OF CALIFORNIA v.
SAN FRANCISCO GAS LIGHT COMPANY.

HARBOR COMMISSIONERS—DOCKAGE—WHARVES—STREETS.—The State Harbor Commissioners have no power to collect dockage upon vessels lying at the Potrero Gas Works' wharf.

APPEAL from a judgment for the plaintiff in the Twelfth District Court of the City and County of San Francisco.

In the agreed case submitted (under § 1138, C. C. P.) the facts are stated as follows:

1. Defendant is a corporation, duly organized and now existing under the laws of the State of California.

2. The defendant, since the seventh day of March, 1873, has been engaged in the manufacture of illuminating gas, in the City and County of San Francisco, at a place known as "The Potrero Station of the San Francisco Gas Light Company Works."

3. A certain wharf, known as the Potrero Gas Works Wharf, situated on the Water Front street, was built by defendant, at its own expense, and used and kept in repair by defendant, at its own expense, since the seventh day of March, 1873, and

has, at all times been, and is now in possession of the defendant; and the dock, adjoining said wharf and connected therewith, has, at all times, been dredged by defendant, at its own expense.

4. Between the first day of October, 1876, and the last day of January, 1877, certain vessels occupied berths at said wharf.

5. Under the rates of dockages, established by the Board of State Harbor Commissioners for the Port of San Francisco, the amount chargeable against said vessels for the use of the said berths occupied by them, as aforesaid, was and is three hundred and twenty-four dollars and fifty cents.

6. The said amount of three hundred and twenty-four dollars and fifty cents dockage was, since the rate of dockage of said vessels was established and before the commencement of this agreed case, collected and received by defendant of and from the agents and owners of said vessels.

7. That no portion of said three hundred and twenty-four dollars and fifty cents has been paid to plaintiffs, or to the Board of State Harbor Commissioners.

8. Before the commencement of this agreed case, plaintiffs made demand on defendant for the said money so collected and received, as aforesaid.

9. If said wharf is within the jurisdiction of the Board of State Harbor Commissioners, for the purpose of collecting dockage and wharfage, then there is due from defendant to plaintiffs the said sum of three hundred and twenty-four dollars and fifty cents, the dockage of said vessels, as money had and received by defendant, to plaintiffs' use.

And upon these facts, the questions submitted for determination were:

1. Is the wharf, designated as "Potrero Gas Works Wharf," under the jurisdiction of the Board of State Harbor Commissioners?

2. Has the defendant the legal right to collect dockage for vessels occupying berths at said wharf?

3. Have the plaintiffs or the Board of State Harbor Commissioners the right to collect dockage from vessels occupying berths at said wharf?

4. Have the plaintiffs the legal right to the three hundred

and twenty-four dollars and fifty cents collected by defendant as aforesaid?"

Clement, Osment & Clement, for Appellant.

This is an agreed case. The plaintiff seeks to recover dockage for vessels landing at the Potrero wharf.

Subdivision 3 of the agreed statement shows that the wharf in question was "built by defendant, and has been used and kept in repair by defendant at his own expense since the seventh day of March, 1873, and has at all times been, and is now, in the possession of the defendant, and that the dock adjoining said wharf, and connected therewith, has at all times been dredged by defendant at his own expense."

The only theory upon which the plaintiff bases its right to collect dockage from the defendant is that the wharf and dock in question are shown by the diagram to be upon a street known as "Water Front Street," and therefore they are under the jurisdiction of the Harbor Commissioners by virtue of §§ 2524 and 2525, Pol. Code; see Amendments of 1875-6, 36-51.

Sections 2524 and 2525 do not apply to this case. Section 2525 says: "The Board of State Harbor Commissioners are authorized to extend any of the streets, * * * to a width not exceeding one hundred and fifty feet where they are not already extended."

The word extend means to "construct," for the next sentence reads: "The outer half of such streets must be constructed or built * * * by the Harbor Commissioners * * * and may be used as a landing place or pier on which dockage, wharfage, and tolls may be collected. And until such extensions are made, the Commissioners may have and use as a landing place, etc., so much of the streets now fronting on the water front as may be used for such purpose without obstructing the same as a thoroughfare. The inner half of such streets to be constructed * * * by the owners of the lots abutting thereon."

Thus the streets over which Section 2525 gives the Harbor Commissioners jurisdiction are such streets as they may construct the outer half of; or, such other streets as can be used as a landing place or pier, etc., and these may only be used in

such a manner as not to interfere with such streets as "thoroughfares." Now, how can this section be extended to water streets, such as the premises in question are?

A water street cannot be used as a landing place or pier, and it is only such streets as can be used for the purposes of a landing place or pier that Section 2525 gives the Commissioners the right to collect tolls for landing on.

The wharf of the Gas Light Company is not a street—nor a part of a street—nor was it constructed as such—nor is it contended that it was. It was built for the purpose of being used as a wharf, and the record shows that it is claimed as a wharf by the respondent.

Section 2524 of the Political Code as amended in 1875-6 contains the last established boundary of the water front of San Francisco, and defines the jurisdiction of the Harbor Commissioners. The section is very long. Hidden away in the middle of it is the following clause: "And said commissioners in addition to general control over said premises [to wit: From the harbor line, as established in this section, six hundred feet out into the bay] shall have authority to use for loading and landing merchandise with a right to collect dockage, wharfage and tolls thereon, such portion of the streets * * * ending or fronting upon the waters of the bay as may be used for such purposes without obstructing the same as thoroughfares," etc.

The above section (2524) defined the jurisdiction of the Harbor Commissioners as to collecting dockage, tolls and wharfage on streets from the date of its passage, February 28, 1876, down to April 3, 1876, at which date a new section was enacted by the Legislature which more specifically defined the jurisdiction of the Board as to collecting wharfage, dockage and tolls on streets.

The section which was adopted in April was Section 2525. (See Amendments of 1875-6, p. 51.)

Section 2525 (as will be readily seen) was intended by the Legislature as a substitute for that portion of Section 2524 above quoted. It makes clear, plain, distinct and specific the cases in which the Harbor Commissioners may collect wharfage, dockage and tolls on streets.

Section 2525 governs Section 2524 as being the last amendment, and the fullest and most specific Act on the subject.

J. B. Lamar, for Respondents.

Potrero Gas Works' wharf is within the jurisdiction of the Board of State Harbor Commissioners; and said Board has the exclusive right to collect dockage, wharfage and tolls thereat. (Political Code, Section 2524; *Angel on Tide Waters*, 192-218; *People v. Davidson*, 30 Cal. 379; *Dana v. Jackson Street Wharf Co.* 31 id. 118; Political Code, Sections 2522-5; *Gunter v. Geary*, 1 Cal. 462; *Cannon v. City of New Orleans*, 20 Wall. 577.)

The defendant is not only unauthorized to collect dockage at said wharf, but is positively forbidden. (Civil Code Sections 801, 802, 1654; *San Francisco v. Spring Valley Water Works*, 48 Cal. 493; Penal Code, Section 642.)

W. W. Morrow, for Respondents.

Since the briefs now on file in the above entitled cases were written and filed, this Court has decided the case of the *People v. San Francisco Gas Light Company*, 54 Cal. 248, and the case of *Soule et al. v. San Francisco Gas Light Company*, 54 id. 241. As it may be suggested that the Court in determining those cases has passed upon several questions involved in the cases now before the Court, it will be convenient to notice those cases and then restate the points still in controversy between the Board of State Harbor Commissioners and the San Francisco Gas Light Company. In the two decided cases the questions submitted to the Court turned mainly upon the proper construction of the terms of a lease which the Gas Light Company had from the Harbor Commissioners.

In the two cases now before the Court the questions involved relate also to dockage and tolls or wharfage on coal landed at a wharf built by the Gas Light Company at another point on the water front of San Francisco. But the wharf now in question was erected without the consent or permission of the Harbor Commissioners, and is being used without the sanction of a lease or other grant from the State

or the Board of the State Harbor Commissioners, and the claim of the Gas Light Company to exemption from wharfage and tolls is without merit other than that which arises from the mere fact that it has erected the wharf, keeps it in repair, and for its own convenience dredges the dock alongside the wharf.

It is respectfully submitted that this unlicensed occupation of the water front belonging to the State does not entitle the Gas Light Company to the benefits and profits of so valuable a franchise, and is clearly contrary to law. The water front line, as shown on the plats attached to the Transcript, is designated as having been established by the Tide Land Commissioners.

The first question is as to the authority of that Board to establish such a line. This is found in section four of the Act approved March 30, 1868 (Statutes of California, 1867-8, 717.) The establishment of the water front line was coupled with the express reservation that the State should have the right to collect dockage and wharfage along its entire length, and at every part of it.

This is in harmony with the well established principles of law on this subject. The State owns the shore. Such land is not susceptible of reclamation, and can be put to no useful purpose except in connection with a wharf or some other superstructure for commercial or navigation purposes. (*Taylor v. Underhill*, 40 Cal. 471; *Kimball v. MacPherson* 46 id. 103.)

The State has reserved the entire water front of San Francisco for commercial purposes, and for eighteen years it has been legislating in the line of a general system of improvement in behalf of commerce.

A part of this system includes the building of wharves and providing docks for the needs of shipping in this port, and to carry on this improvement it is necessary that the State, like a private owner, should collect wharfage and dockage for the use and occupation of its property.

The record discloses the fact that in 1873, or about five years after the passage of the Act authorizing the establishment of the water front as before stated, the Gas Light Com-

pany entered upon the lands of the State and erected this wharf at the Potrero.

The relation of this wharf so built, to the water front and the jurisdiction of the Harbor Commissioners, was and is precisely the same as the wharf at Berry street, and if in the latter case a lease was necessary to enable the Gas Light Company to have the convenience and exclusive use of such a structure, so it is also necessary at the Potrero. And if the value of the lease of the water front at Berry street was and is the building of the wharf by the lessee to be surrendered to the State at the end of the term, the keeping it in repair during the term and the payment of wharfage on all goods and merchandise landed on the wharf, then no less conditions should be the value of a like portion of the water front at the Potrero. It may therefore be well supposed that the Gas Light Company built the wharf at the Potrero with the full knowledge and understanding that under the statute wharfage would have to be paid to the State on all goods and merchandise landed on the wharf and dockage on all vessels occupying berths alongside of said wharf.

In the briefs on file, it is clearly shown that the wharf in question is within the jurisdiction of the Board of State Harbor Commissioners, and that said Board has the exclusive right to collect dockage, wharfage and tolls thereat. In addition to the authorities cited, I desire, however, to call the attention of the Court to the case of *The Potomac Steamboat Company et al. v. The Upper Steamboat Company*, decided recently in the Supreme Court of the District of Columbia. (8 Washington Law Reporter, 419.)

In the two cases now before the Court, the State is the original and only owner of the water front of San Francisco, and as such owner has the exclusive right to erect and maintain improvements thereon and collect wharfage and dockage for the use of the same. It is plain, therefore, that the Gas Light Company, having merely anticipated the improvements that are being made by the State along the water front in erecting a wharf for its own use and convenience, is subject to the law under which the Harbor Commissioners claim the right to collect dockage and wharfage thereat.

The Court:

The State Harbor Commissioners had no power to collect dockage upon vessels lying at the Potrero Gas Works' Wharf. (*People v. S. F. G. L. Co.*, No. 6,667.)

Judgment reversed and cause remanded.

[No. 7,053.—Department One.]

April 1, 1882.

HYAM JOSEPH v. MANUS DOUGHERTY ET AL.

EXECUTION OF MORTGAGE BY MARRIED WOMAN—ACKNOWLEDGMENT—COMPLAINT—FINDINGS.—In an action to foreclose a mortgage, the complaint alleged, and the Court found that the defendant, a married woman, "*made, executed, and delivered*" the instrument.

Held: The finding that the mortgage was "*executed*" imported that it was "*acknowledged.*"

APPEAL from a judgment for the plaintiff in the Twelfth District Court of the City and County of San Francisco. DAINGERFIELD, J.

R. Percy Wright, for Appellant.

The complaint does not state facts sufficient to constitute a cause of action against the defendant Ann Dougherty.

It appears on the face of the complaint that at the time it is alleged she executed the mortgage, Ann Dougherty was a married woman. The complaint does not contain any allegation that the defendant Ann Dougherty acknowledged the execution of the mortgage, nor is any copy of the mortgage annexed to the complaint. An allegation of the fact of acknowledgment is essential to the cause of action against her, inasmuch as upon the existence of that fact the validity of the mortgage depends. (C. C. §§ 1093, 1181, 1186, 1187; *Hepburn v. Dubois*, 12 Pet. 374; *Jordan v. Corey*, 2 Ind. 385; *Jackson v. Stevens*, 16 Johns. 110.)

If the plaintiff relies on special circumstances to remove the disability of a married woman to make the contract sued upon, they must appear in his pleadings. (*Hardin v. Pelan*, 41 Miss. 112; *Nash v. Mitchell*, 71 N. Y. 199; *Leonis v. Lazzarovich*,

55 Cal. 55.) There is no finding that she acknowledged the execution of the mortgage, either in the manner prescribed for married women or at all. Taking the facts found by the Court together with the material facts alleged in the complaint, and not controverted by the answer of the defendant Ann Dougherty, there is still wanting the essential and vital fact of the acknowledgment of the execution of the mortgage by her.

Jarboe & Harrison, for Respondent.

The allegation and finding that she "made and executed" the mortgage includes all that is requisite to the creation of a perfect instrument. (Webster Dict.: word "execute"; Abbott—Law Dict.; Burrill—Law Dict.)

The acknowledgment being essential to make a married woman's act effective, her deed can not be said to be executed unless it is also acknowledged; or, as was said in the case of *Mariner v. Saunders*, 5 Gilm. 125, quoted with approbation by this Court in *Leonis v. Lazzorovich*, 55 Cal. 57.

R. Percy Wright, for Appellant, in reply:

A careful inspection of the Codes will show that in every part of them the words "execute" and "acknowledge," with reference to instruments, are used to indicate distinct acts or facts, and in Section 1933 of the Code of Civ. Pro. we find: "The execution of an instrument is the subscribing and delivering it." That is the meaning which must prevail. (*Hoag v. Howard*, 55 Cal. 564.) To use the word "execute" in pleading as including the fact of acknowledgment would be to plead a conclusion of law. (*Dutch Flat Water Co. v. Mooney*, 12 Cal. 534.) As to the interpretation of pleadings we cite *U. S. v. Linn*, 1 How. 104; *Bartlett v. Prescott*, 41 N. H. 493; *Winter v. Baker*, 50 Barb. 432; *Moore v. Besse*, 30 Cal. 572; *Rogers v. Shannon*, 52 id. 107; *Cross v. Evarts*, 28 Texas, 532; *Nichols v. Gordon*, 25 id. Sup. 112, and cases cited there; C. C. § 1187; *Dye v. Dye*, 11 Cal. 163; *People v. Jackson*, 24 id. 631; *Himmelman v. Danos*, 35 id. 441; *Dutton v. Warschauer*, 21 id. 610; *Mack v. Wetzlar*, 39 id. 255; *Stoddard v. Treadwell*, 26 id. 294.)

Ross, J.:

This action was brought to foreclose a mortgage. The complaint alleged that the defendants "made, executed and delivered" to the plaintiff a certain indenture of mortgage, by which they granted, bargained and sold, conveyed and confirmed, unto the plaintiff, the lot of land described in the complaint, as security for the payment of a certain promissory note. The defendant, Ann Dougherty, who is the appellant, answered the complaint and denied that she ever "made, executed or delivered" the instrument. After trial, the Court below found that appellant "made, executed and delivered" the mortgage to the plaintiff.

The sole point relied on by appellant for a reversal of the judgment is, that inasmuch as she is a married woman the complaint should have alleged, and the findings should have shown, that she "acknowledged" the execution of the mortgage, in order to have constituted a cause of action against her. But in the case of a married woman the acknowledgment is a part of the execution of the instrument. (Civil Code, §§ 1186 and 1187; *Wedel v. Hermann*, 59 Cal. 507; *Leonis v. Lazzarovich*, 55 id. 55.) Until acknowledged it is not executed, but when executed it is acknowledged; for when it is said that an instrument is "executed," every act is imported which was requisite to make it operative and effective. In this case, acknowledgment being necessary, the averment of the complaint and the finding of the Court, that the mortgage was "executed," imports that it was "acknowledged."

Judgment affirmed.

McKINSTRY and McKEE, JJ., concurred.

[No. 7,100.—Department One.]

April 1, 1882. •

JOHN DURKIN v. E. W. BURR ET AL.

DEED OF TRUST—FORECLOSURE—MORTGAGE—INJUNCTION.—Appeal from an order refusing to enjoin a sale under a deed of trust affirmed on authority of *Grant v. Burr*, 54 Cal. 298, and *Bateman v. Burr*, 57 id. 480.

APPEAL from an order in Fourth District Court of the City and County of San Francisco. EVANS, J.

Mich. Mullany, for Appellant.

A. N. Drown, for Respondents.

The COURT:

On the authority of *Grant v. Burr*, 54 Cal. 298, and *Bateman v. Burr*, 57 id. 480, the order is affirmed.

[No. 7,528.—In Bank.]

April 1, 1882.

PERRY LE BLANC, EXECUTOR ETC., v. MORGAN J. CRAWFORD.

ACTION FOR RENT—HOLDING OVER—FINDINGS—SUFFICIENCY OF EVIDENCE.—

In an action for rent the complaint alleged a written lease, and a holding over after the expiration thereof. The Court found that there was no written lease, but an express contract from year to year to pay three hundred dollars per annum.

Held: The finding is not supported by the evidence; and the judgment cannot be sustained upon the ground there was no implied agreement to pay the value of the use and occupation, because the Court does not find what was the value.

APPEAL from a judgment for the plaintiff and from an order denying a new trial in Superior Court of the County of San Joaquin. PATERSON, J.

F. J. Baldwin, *J. C. Campbell* and *J. H. Budd*, for Appellant.

Terry, McKinne & Terry, for Respondent.

SHARPSTEIN, J.:

The allegation in the complaint is that "the land was leased by the plaintiff to the defendant on or about the — day of October, 1874, for three hundred dollars per annum, payable on or about the — day of October, 1875, under a *written lease* for the first year, and that defendant has continued to occupy, cultivate and use said lands since said — day

of October, 1874. That the value of the occupation and use of said land since, etc., was the sum of twelve hundred dollars."

The finding of the Court is "that no written lease ever was made by plaintiff and defendant for the use and occupation of said premises by defendant, but that there was an express verbal agreement each and every year, and an express promise on the part of defendant each and every year from the — day of October, 1874, to the — day of October, 1878, that the defendant would pay to the plaintiff, for the use and enjoyment of the said undivided half interest of the estate of Hough, the sum of three hundred dollars a year."

The complaint is founded upon a written lease and a holding over after the expiration thereof, from which the law would imply a promise to pay the same amount of rent per annum that was stipulated for in the lease. The finding is that there was no written lease, but an express contract from year to year to pay three hundred dollars per annum for the use and occupation of a portion of the premises described in the complaint.

But this finding is not supported by the evidence. There is no proof of any such express agreement, and the judgment cannot be sustained upon the ground that there was an implied agreement to pay the value of the use and occupation of the premises, because the Court does not find what was the value of the use and occupation.

Judgment and order reversed.

MORRISON, C. J., and ROSS, MYRICK, MCKEE, and McKINSTRY, JJ., concurred.

[No. 7,169.—Department Two.]

April 3, 1882.

J. P. SWEENEY ET AL. v. LELAND STANFORD.

MOTION TO SET ASIDE JUDGMENT—WAIVER OF JURY TRIAL—CALENDAR OF COURT.—A case for goods sold and delivered, was, on motion of plaintiff's attorney, put upon the equity calendar in the absence and without the knowledge of the defendant, and in consequence the case was tried without his presence, and judgment rendered for the plaintiffs for the

full amount claimed. A motion of the defendant to set aside the judgment was subsequently denied by the Court for the reason that the notice of the motion did not specify the grounds upon which it would be made.

Held: The failure of the defendant to appear when the case was called on the equity calendar did not operate as a waiver of a jury for the reason that the case was improperly there.

ID.—ID.—ID.—NOTICE OF MOTION—AMENDMENT—DISCRETION OF COURT.—

Assuming that the motion was properly denied on the ground stated, it was the duty of the Court to allow defendant's motion for leave to amend his notice so as to make it conform to the rule of the Court. The Code is very liberal on the subject of amendments, and the recent decisions of this Court have been in full accord with the spirit of the Code.

RULES OF COURT—JUDICIAL NOTICE.—(SHARPSTEIN, J).—This Court does not take judicial notice of the rules of the Superior Court.

APPEAL from a judgment for the plaintiff and an order refusing to vacate said judgment in the Superior Court of San Francisco. SULLIVAN, J.

J. E. Foulds, for Appellant.

Counsel for plaintiff admits that the defendant refused to waive his right to a trial by jury, but that notwithstanding such refusal, on the third of February, 1880, in the absence of defendant's counsel, he (plaintiff's counsel) caused the case to be put upon the calendar of causes to be tried by the Court without a jury. He admits that he never gave defendant's counsel any notice of this action on his part, and defendant's counsel deposes that he was in entire ignorance of the transaction until after the judgment had been rendered. This is uncontradicted. The Court had no right to place the case upon the calendar for trial without a jury, upon the mere waiver of a jury by one of the parties, in the absence of the other. It was the duty of the Court to place it on the jury calendar.

If Section 631 of the Code of Civil Procedure continued in force to July, 1880, we would nevertheless be entitled to have the judgment vacated, because the case was never legally called. The defendant had never been allowed an opportunity of a trial by jury. How, then, could he be deemed to have waived it? But, the first subdivision of that section of the Code was repealed by the passage of the Constitution. The language of Section 7, of Article i. is

equivalent to "a trial by jury may be waived in civil actions, by the consent of the parties, signified in such manner as may be prescribed by law, and not otherwise."

The section of the Code, as we have shown, does prescribe two modes in which the parties may consent to a waiver. These are in accord with this provision of the Constitution. The other method, however, "by failing to appear at the trial," not being by consent of the parties, falls clearly under the implied prohibition. Prohibitions do not require legislation to carry them into effect, and this is the doctrine of the decision in *Ewing v. Oroville Mining Co.*, 56 Cal. 653.

Edward P. Cole, Attorney for Respondent.

The failure of a party to appear when the cause was called, authorized the trial by the Court without the intervention of a jury. (*Doll v. Feller*, 16 Cal. 434; *Gillespie v. Benson*, 18 id. 410.)

This § 631 of the C. C. P. was in force till the first day of July, 1880; and the above action was tried under that section of the Code of Civil Procedure. (Article xxii, section 1, New Constitution; *Ewing v. Oroville Mining Co.*, 56 Cal. 653.) The counsel for appellant urges that the judgment should have been vacated on the first motion. The answer to this is brief. The notice of motion did not specify the grounds on which the motion would be made. And the law is clear that where the law is defective in this regard, the motion must be denied. (*Freeborn v. Glazer*, 10 Cal. 337; *Loucks v. Edmondson*, 18 id. 204; Superior Court Rule No. 8.)

The opening of defaults rests very much in the discretion of the Court below, and the order of the Court will not be disturbed unless the order is so plainly erroneous as to amount to an abuse of discretion. (*Coleman v. Rankin*, 37 Cal. 249; *Bailey v. Taaff*, 29 id. 422; *Ekel v. Swift*, 47 id. 620; *Nooney v. Mahoney*, 30 id. 226.)

Ed. P. Cole, for Respondents. (on application for hearing in Bank.)

The counsel for respondents most respectfully calls this Honorable Court's attention to the fact that neither he nor any one else ever stated to the Lower Court that a jury was

waived, nor does the judgment of that Court recite any such fact; even appellant admits that. The affidavits of Carter and of Brooks say they were both present at the calling of the calendar, and that a jury was waived on the part of the plaintiffs. The recital of the judgment is to the same effect:

"This cause was called regularly in its order upon the trial calendar for hearing and determination, Mr. E. P. Cole appearing for plaintiff, and no one for defendant, the cause was tried before the Court sitting without a jury, a trial by jury having been expressly waived by plaintiff, and the defendant having waived a trial by jury by failing to appear at said trial."

MORRISON, C. J.:

Plaintiffs brought their action against defendant to recover the sum of one thousand two hundred and thirty-one dollars for goods, wares and merchandise sold and delivered. The complaint was answered in due time, and the case was put on the calendar for trial. When the calendar was called, the defendant's attorney was not in attendance, but the attorney for the plaintiffs being present, stated to the Court that a jury trial was waived, whereupon the case was put on the *equity* calendar for trial. Of this fact neither the defendant nor his attorney had any notice; but both supposed that the case was on the jury calendar. The consequence was that the case was tried in the absence of defendant's attorney, and judgment was rendered in favor of plaintiffs for the full amount claimed. Defendant thereupon gave notice of a motion to set aside the judgment, and accompanied his motion with affidavits of merits and surprise. The Court denied the motion because the notice did not state the grounds upon which the motion to set aside the judgment would be made. Defendant thereupon asked leave to amend his notice of motion, but leave was denied.

The case properly belonged on the jury calendar, and the right to a jury trial was not waived by the defendant. The action was a common law action and the right of trial by jury existed unless it was waived; first, by failing to appear at the trial, second, by written consent in person or by attorney filed

with the Clerk, or, third, by oral consent in open Court, entered in the minutes. (Sec. 631, C. C. P.)

In the case before us, there was no waiver in any one of the modes prescribed by the Code. If the case had been put on the jury calendar where it properly belonged, and if, when called on that calendar for trial, the defendant had failed to appear, there would have been a waiver of the right of trial by jury; but the failure of the defendant to appear when the case was called on the equity calendar, did not operate as a waiver, for the simple reason that the case was improperly on the equity calendar, and should not have been there. Neither the defendant nor his attorney was chargeable with laches in failing to notice the business on the equity calendar, as neither had any notice whatever that the case was there for trial. It seems that the Court denied the motion to vacate the judgment "for the reason that the notice of said motion did not specify the grounds upon which the same would be made." We infer from the language of the order that there is a rule of the Superior Court requiring such a notice to contain a statement of the grounds upon which the motion is made, and assuming that the motion was properly denied, because the notice was insufficient, we think it was the duty of the Court to allow defendant's motion for leave to amend his notice, so as to make it conform to the rule of the Court. There is no doubt that the plaintiff's attorney knew, and the Court also knew, upon what grounds defendant moved, because there was attached to the notice an affidavit in which the grounds were fully stated. The Code (Sec. 473, C. C. P.), is very liberal on the subject of amendments, and the recent decisions of this Court have been in full accord with the spirit of the Code.

We are of the opinion that the defendant should have been allowed to amend his notice of motion, and that the Court erred in denying his motion for leave to amend.

The order is therefore reversed.

MYRICK, J., concurred.

SHARPSTEIN, J.:

I concur. It seems to me that the appellant made a show-

ing, upon which he was entitled to have the judgment vacated, and the only ground assigned by the Court for not granting the motion was that the notice of motion did not specify the grounds upon which it would be made; and the respondents in their brief cite a rule of the Superior Court, which requires that the grounds of the motion shall be stated in the notice. But I am unable to find in the record any evidence of the existence of such a rule, and this Court does not take judicial notice of the rules of the Superior Court. (*Cutter v. Caruthers*, 48 Cal. 178; *Warden v. Mendocino Co.*, 32 Cal. 655.)

[No. 8,238.—In Bank.

April 4, 1882.

E. B. McCOPPIN v. AMOS McCARTNEY ET AL.

TAXATION OF SATISFIED MORTGAGE—CONSTITUTIONAL LAW.—The provision of the Constitution as to the taxation of mortgages applies to mortgages executed prior thereto.

ID.—ID. VESTED RIGHT.—A mortgage prior to the adoption of the new Constitution did not have a vested right of exemption from taxation which extended beyond the life of the former Constitution. Even if he had a contract with his mortgagor by which the latter agreed to pay all taxes, a change in the law which imposed the duty on him to pay the tax in the first instance would not violate the obligation of the contract.

ID.—ID.—MORTGAGOR AND MORTGAGEE.—An erroneous assessment of a mortgage already satisfied is not void. In such case (Pol. C. § 3678) by operation of law the tax on the mortgagee's interest is valid only against the real estate, and payable by the owner of the land whose estate has been enlarged by the release of the mortgage lien.

APPEAL from a judgment for the plaintiff in the Superior Court of the City and County of San Francisco. EVANS, J.

Action to cancel a tax sale to the defendant McCartney and to enjoin the defendant Grady, who was tax collector, from making a deed in pursuance thereof. The assessment under which the sale took place was for the year 1880–81.

Fred. D. Brandon, for Appellant.

The assessment of the mortgage was valid as a lien upon the land. It is alleged in the complaint that the mortgage

debt had been paid at the date of its assessment, although the mortgage was still uncanceled of record. The mortgage is "an interest in the land." (Cal. Const. Art. xiv, § 4.)

If the tax was improperly assessed against the mortgage by reason of the mortgage having been paid, the tax remained valid against the land. (Pol. Code, § 3678.) Hence it is immaterial to a sale, otherwise regularly made, whether the tax was assessed by indirection through the mortgage, or directly against the land; in either case the tax is valid against the land, and the sale is good. The assessment of the mortgage was not in conflict with any constitutional provision.

The provisions of the new Constitution relative to the assessment of mortgages operate alike upon those created prior or subsequent to the adoption of that instrument. Such assessment does not impair the obligation of a contract; that will remain of binding force between the parties, with like remedies in case of breach, as with other contracts. The relation of the parties toward each other is not altered, but only their relation toward the State.

Edward J. Pringle, also for Appellant.

The Constitution of 1880 made a revolution in the revenue system of the State. Instead of taxing only visible and tangible property, it treats as property for the purposes of taxation all promises to pay or evidences of indebtedness.

As the only means of giving harmony to the system and enforcing the collection of the tax, the mortgage is made by the Constitution an interest in the land. Thenceforth there is but one thing to tax—the land. And the only inquiry from the State is, to whom the several interests shall be taxed; how much to the owner, how much to the mortgagee. Of course, this inquiry is attended with as much uncertainty as ordinarily attends the other questions surrounding the ownership of property. But the land being visible, and the several ownerships invisible, the State looks to the land for its tax, and makes careful provision that no mistake as to the invisible and uncertain shall release its hold of the visible and tangible object upon which it relies. (Pol. C. §§ 3628, 3807, 3678.)

In the present case the complaint shows that the mortgage

had been paid before the first Monday in March; the answer shows that from the assessment on the real estate the deduction of the mortgage had been previously made.

The tax is always a tax upon the land. Whether assessed to owner or mortgagee the land is always liable to be sold for the tax. If erroneously taxed to the mortgagee it is "valid only as against the land." To the State and to the land it is wholly immaterial whether the mortgage be paid or not. If it be unpaid, the land is sold to pay the tax rightfully assessed to the mortgagee; if it be paid, the land sold to pay the tax is wrongfully assessed to the mortgagee.

The Court below decided the case on the ground that the new Constitution was intended to take effect only upon mortgages executed subsequent to its passage.

But surely it is not retrospective to operate thereafter upon existing debts. When the Constitution took effect, it operated thenceforward upon all the different classes of property enumerated in the tax list. A chose in action which was not recognized as property before, becomes taxable property thereafter.

But there is unmistakable internal evidence that these provisions of the Constitution in relation to taxation of mortgages were intended to take effect upon existing debts and mortgages. For Section 4 of Article xiii, provides that "every contract *hereafter made*," by which a debtor is obligated to pay any tax on money loaned, or on any mortgage, shall be null and void. If no mortgages were intended to be taxed but those hereafter made, there would be no occasion for making that limitation upon the contracts prohibited.

T. C. Van Ness, for Respondent.

The mortgage debt having been paid, the assessment was void. Prior to the adoption of the present Constitution mortgages were not taxable. (*People v. Hibernia Bank*, 51 Cal. 243.) The taxation of mortgages, as an interest in land, is the creature of the new organic law. The legislative power to thus indirectly tax the land is derived from that instrument, and, so far as legislative enactment exceeds the constitutional limitation, it is void. (State Constitution, Art. xiii, § 4.) The property involved in this action was one of three

pieces mortgaged to secure the payment of a note for forty thousand dollars, executed March 15, 1872. So much of that debt as was secured by this particular piece of property was paid many years antecedent to the tax sale under which defendant claims. The payment of the debt extinguished the mortgage *pro tanto*. (*McMillan v. Richards*, 9 Cal. 365.) The mere assessment of an uncanceled record was void and the purchaser of the property at tax sale obtained no rights. (State Cons., Art. xiii, § 4; Pol. C., §§ 3617-3627.) The Assessor is armed with full statutory powers to ascertain the existence or non existence of the debt. (Pol. C., §§ 3626, 3629, 3632.) And if he fails to exercise these powers, the State cannot suffer. (Pol. C., §§ 3660-3662.)

The defendants may rely upon the Political Code, Section 3678, upon this point. The Court will notice that the language of that section is "to assist" the Assessor, the Recorder must do certain acts. The abstract of mortgages to be transmitted by the Recorder is to consist of mortgages given to secure debts not barred by the statute of limitations. And upon the basis of this abstract the Assessor *may*, but need not necessarily, list upon the assessment roll any mortgages therein contained. But where the Recorder includes in the abstract, or the Assessor thereupon lists on the assessment roll any mortgage given to secure a debt barred by the statute, they have both, and each of them, exceeded their statutory powers, and to that extent their acts are void. It is clear that the statute contemplated that mortgages not barred by limitation, and appearing of record, should be considered *prima facie* alive, and that if any such mortgage should be paid prior to its assessment, the assessment of the same should be a valid lien against the property covered thereby. But I think it is equally clear that such intendment of the statute does not extend to mortgages barred by limitation.

The assessment of any other mortgage is a void act, and, as to such, Section 3678 does not apply, and the argument of appellant based upon that section falls to the ground.

Section 3678, Political Code, is clearly unconstitutional, in so far as it validates the assessment of a satisfied mortgage. As has been before remarked, a mortgage could not have been taxed prior to the adoption of the new Constitution, and the

breadth and length of the legislative power in this respect is gauged by that instrument. But only a mortgage which secures a debt can be taxed under its provisions. (State Const., Art. xiii, § 4.)

It would seem that, in view of all the powers given to the Assessor to ferret out the truth in regard to the existence of property, and the safeguards thrown around the interests of the taxing power, that officer should not be allowed to grope around blindly in the dark, as was done in this case.

The proceedings by which a party is divested of his property at a tax sale is *in invitum*, and the statutes under which these sales are made are to be strictly construed against the purchaser of the tax title. (Blackwell on Tax Titles, 4. ed. marginal, pp. 61 to 65; Cooley's Const. Lim., 3. ed., p. 521; *Ferris v. Cooper*, 10 Cal. 632; *Kelsey v. Abbott*, 13 id. 618; *People v. Mahoney*, 55 Cal. 286.)

The COURT:

It is urged by respondent that the assessment of the mortgage interest was void, because the mortgage was executed in 1872, and the Constitution operates prospectively, authorizing only the taxation of mortgages created subsequent to its adoption. But a mortgagee, prior to the adoption of the new Constitution, did not have a vested right of exemption from taxation which extended beyond the life of the former Constitution. Even if he had a contract with his mortgagor by which the latter agreed to pay all taxes, a change in the law which imposed the duty upon him to pay the tax on the mortgage interest in the first instance, would not violate the obligation of the contract. Mortgagee might still enforce his contract against mortgagor. His relation to the debtor would not be changed, but only his relation to the State. The plain intent of the new Constitution is to subject to taxation classes of property previously exempt. That one of the new classes consists of credits, secured or unsecured, no more violates any contract or vested right, of the creditor, than would a provision by which, for the first time, the owner of any *tangible* property should be taxed upon its value.

It is further urged that the tax upon the mortgage interest in the land is void, because the mortgage debt had been paid

and the lien released. But Section 3678 of the Political Code provides: "Any assessment on a mortgage or deed of trust, which has been erroneously taxed to the mortgagee or the party loaning the money, when the same has been paid or satisfied prior to the first Monday in March, shall be valid only as against the real estate from the assessment on which a deduction has previously been made." The real estate is appraised at its just valuation. An existing mortgage is deemed an interest in the real estate, and its value is assessed to the mortgagee or his assignee; the balance of value being assessed to the owner of the land. If, however, by mistake a mortgage which has been paid off shall be assessed, then, by operation of law, the tax on the mortgagee's interest is valid only against the real estate, and payable by the owner of the land, whose estate has been enlarged by the release of the mortgage lien. Such is the system, in which we see nothing in conflict with any provision of the Constitution.

Judgment reversed

McKEE, J., dissented.

[No. 6,892.—In Bank.]
April 4, 1882.

B. B. NEWMAN ET AL. v. URBAN BIRD.

UNLAWFUL DETAINER—LANDLORD AND TENANT—DEMAND FOR RENT.—In an action by a landlord against a tenant for holding over after default in the payment of rent and demand therefor, the demand proved was for "the sum of ten dollars which became and was due from you as such rent to us on the twenty-eighth day of April, 1879, for the *preceding* month of your tenancy," etc. and it was objected that the notice failed to denote *what* preceding month was intended: *Held*: The notice was sufficiently definite.

ID.—VERIFICATION OF PLEADING BY AGENT.—In an action of unlawful detainer the complaint was verified by an agent of the plaintiff, who stated in the affidavit that the facts stated in the complaint were within the knowledge of affiant. *Held*: The complaint was properly verified.

ID.—OTHER ACTION PENDING—FINDING—CONCLUSION OF LAW.—Upon the issue of another action pending in the same Court for the same cause of action, the Court found "that there was not at the time of the commencement of this action any other action pending in this Court between the

parties to this action for the same cause of action mentioned and contained in the cause of action set forth in the complaint in this action."

Held: The finding was sufficient.

APPEAL from a judgment for plaintiffs in the County Court of Alameda County. REDMAN, J.

Taylor & Haight, for Appellant.

The notice served on the defendant by plaintiffs was insufficient, and not in accordance with Subdivision 2 of Section 1161, C. C. P. One who seeks the summary remedy allowed by the statute must bring himself closely within its terms. (*Opera House Association v. Bert*, 52 Cal. 471; *Brewster v. Bours*, 8 id. 501; *People v. Matthews*, 38 N. Y. 451; *Deuel v. Rust*, 24 Barb. 438. The complaint was not properly verified (C. C. P. §§ 1175, 446.)

The circumstance of the facts being within the knowledge of the affiant is no evidence that they were not also within the knowledge of the plaintiffs, or that plaintiffs were absent from the county, or unable to verify it. The statute is imperative that the complaint must be verified. See, also: *Fitch v. Bigelow*, 5 Howard Prac. 237; *Waggoner v. Brown*, 8 id. 212; *Soutter v. Mather*, 14 Abbott's id. 440. The finding on the pendency of another action, which was pleaded as a bar to this action, is a conclusion of law, and not sufficient as a finding of fact on that point.

B. B. Newman, Propria Persona.

S. W. Holladay, for Respondents.

The verification of the complaint was sufficient (C. C. P. § 446; *McCullough v. Clark*, 41 Cal. 298-302; *Wilkin v. Gilman*, 11 id. 225; *Meads v. Gleason*, 13 id. 309; *Imlay v. New York R. R. Co.*, 1 Sandford, 732; *Gourney v. Wersuland*, 3 Duer. 613).

The finding upon the issue of another action pending is the finding of an ultimate fact and not a conclusion of law. (*Jones v. Clark*, 42 Cal. 180, 192-3; *James v. Williams*, 31 id. 211.)

MORRISON, C. J.:

Action to recover the possession of certain premises in the

complaint described, alleged to have been leased by plaintiffs to defendant. The case comes up on the pleadings and findings—there being no bill of exceptions or statement in the record.

The findings show that the plaintiffs were, on the twenty-ninth day of October, 1878, and ever since have been, tenants in common of the premises; that on that day they leased the same to the defendant for the term of one month; that by virtue of said lease defendant went into the possession thereof, and that he still remains in possession of the same, although the term of the lease has expired; that by virtue of the lease there became due to the plaintiffs, on the twenty-eighth day of April, 1879, the sum of ten dollars, and on the twenty-eighth day of May, 1879, the additional sum of ten dollars; that no part of said sums has been paid; that on the tenth day of June, 1879, demand of the rent was duly made in writing, but the defendant failed, neglected and refused to pay the same within three days; that demand upon the defendant to deliver up the possession of the premises was duly made; that the defendant has neglected and refused to surrender such possession; that the defendant wrongfully withholds the premises from the plaintiffs; that there was not, at the time of the commencement of this action, any other action pending between the parties to this action, for the same cause mentioned and set forth in the complaint. From the foregoing findings of fact, the Court found, as a conclusion of law, that the plaintiffs were entitled to a judgment for the restitution of the premises in the complaint described.

1. The first point made on appeal is that the demand of the rent was insufficient, under Subdivision 2 of Section 1161, C. C. P. The notice was that "we hereby demand of you to pay the rent of the premises hereinafter described, and which you now hold possession of as our tenant, and which is unpaid, to wit, the sum of ten dollars, which became and was due from you as such rent to us on the twenty-eighth day of April, 1879, for the preceding month of your tenancy, and the sum of ten dollars, which became due from you as such rent to us on the twenty-eighth day of May, A. D. 1879, for the preced-

ing month of your tenancy, making a total sum of rent now due and unpaid of twenty dollars."

The contention is, that the notice is bad because it is simply for the rent of the preceding month, and does not denote what the preceding month was. We think, however, that the notice was sufficiently definite. The month preceding the twenty-eighth of April was, by fair intendment, the month commencing on the twenty-eighth of March, and the month preceding the twenty-eighth of May was the month commencing on the twenty-eighth of April. A fuller specification of the facts would not have given the defendant a clearer conception of the meaning and purpose of the notice.

2. The next point relates to the verification of the complaint. By Section 1175, C. C. P., it is required that the complaint in this form of action, shall be verified. The complaint in this case is verified by one Bird, who states that he is the agent of the plaintiffs; that he has heard read the foregoing complaint; that he knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, etc.; that the facts stated are within the knowledge of the affiant, and therefore affiant swears that the facts stated in the complaint are within his own knowledge, and that they are true.

Section 446 of the Code of Civil Procedure provides that "when a pleading is verified it must be by the affidavit of a party, unless the parties are absent from the county where the attorney resides, or for some cause unable to verify it, or the facts are within the knowledge of his attorney, or other person verifying the same. When the pleading is verified by the attorney, or any other person except one of the parties, he must set forth in the affidavit the reasons why it is not made by one of the parties." The reason given in this case for the verification of the complaint by the agent is, that the facts are within his knowledge, and that brings the case within the language of the section of the Code above cited. We are therefore of the opinion that the complaint was properly verified.

3. The last point relied upon by the appellant is, that there is no finding upon the allegation of the answer "that during the month of April, 1879, the plaintiffs in this action brought

an action in this Court of unlawful detainer against the defendant herein, for the purpose of obtaining restitution of the identical premises for which they seek restitution in this action," and that said action is still pending and undetermined. The finding of the Court upon this allegation is "that there was not, at the time of the commencement of this action, any other action pending in this Court between the parties to this action for the same cause of action mentioned and contained in the cause of action set forth in the complaint in this action."

It is claimed that the above finding is a conclusion of law and not a finding of fact. The finding negatives the allegation in the answer, and we are unable to discover any objection to it. Whether there was or was not another action pending in the same Court between the same parties for the same cause, were matters of fact, and not conclusions of law. We think the finding was sufficient, and, no error appearing in the record, the judgment is affirmed.

THORNTON, ROSS, MYRICK, MCKINSTRY, and SHARPSTEIN, JJ., concurred.

[No. 7,196.—Department Two.]

April 4, 1882.

FREDERICK WEISENBORN v. GUSTAVE NEUMANN
ET AL.

DISCRETION OF COURT IN SETTING ASIDE JUDGMENT—MISTAKE—AMENDMENT TO COMPLAINT—PROMISSORY NOTE—DEMURRER.—In an action to foreclose a mortgage the Court below set aside a judgment against the plaintiff entered upon a demurrer to the complaint, and permitted the plaintiff to file an amendment to his complaint setting up a mistake in drawing up the note sued upon.

Held: Assuming that the Court may in a proper case grant relief against a final judgment on demurrer, the circumstances attending the case in hand did not justify such action.

APPEAL from an order in the Superior Court of San Francisco. EDMONDS, J.

The note sued upon was as follows:

"SAN FRANCISCO, January 17, 1878.

"Five (5) years after date, without grace, I promise to pay to Frederick Weisenborn, or order, the sum of eight thousand (\$8,000) dollars, payable only in gold coin of the government of the United States, for value received, with interest thereon in like gold coin at the rate of eight (8) per cent. per annum from February 1, 1878, until paid, and if not so paid, then to be added to and become a part of the principal, and thereafter bear like interest. It is understood and agreed that I can at any time pay on account of this note sums not less than one thousand dollars at a time.

"GUSTAVE NEUMANN."

The mortgage contained the following provisions: "Provided, nevertheless, that if the said party of the first part, shall well and truly pay, or cause to be paid, the said promissory note, with the interest as it shall become due and payable thereon, according to the tenor and effect thereof, then in such case, this indenture, and the estate hereby granted, shall be null and void, else to remain in full force and virtue. But it is distinctly understood and agreed, that if the interest on paid promissory note or the principal thereof shall not be punctually paid when the same becomes due and payable, as in said note mentioned, then and in such case the principal sum of said note and the interest shall be deemed and taken to be wholly due and payable."

The affidavit of John J. Mone was to the following effect: "That on or about the sixteenth day of December, 1879, Mr. R. H. Lloyd (of the law firm of Lloyd, Newlands & Wood, of which deponent is principal clerk) instructed deponent to bring a suit to foreclose the mortgage mentioned and described in plaintiff's complaint herein. That deponent knew nothing of the facts of the case at that time other than what the face of the said mortgage discloses. That deponent drew the complaint in this action, filed the same, and when the Court sustained the demurrer filed by defendant herein, he (deponent) took proceedings towards taking an appeal. Deponent at the time of bringing the suit and drawing the complaint knew nothing about the facts which would entitle the said plaintiff to have had the said mortgage reformed, other-

wise he would have requested the Court in the said complaint to reform the mortgage, and would have so drawn the complaint that the question of the right of the plaintiff to have a reformation of the mortgage would have been directly presented to the Court on the face of said complaint. That deponent did not learn the facts until a considerable time after he had in open Court waived time and declined to amend plaintiff's complaint, and a short time ago."

The affidavit of the plaintiff stated in effect that the mistake had been made as alleged; that the defendant had paid interest monthly on the note according to its supposed terms for twelve months and proceeded as follows:

"That when said note and mortgage were drawn said mortgage was read over quite hurriedly, and this deponent never knew or suspected that said omission had occurred until four or five months before the commencement of this action, when he was informed by the father of the defendant, Neumann, that the mortgage provided that the interest should be added to the principal, if not paid when due.

"Deponent further states that when this suit was commenced, it entirely escaped his attention that the complaint stated to the effect that no interest had been paid on the note and mortgage sued upon, and that deponent had no intention of making such statement. No interest has been paid on said note and mortgage except as hereinbefore mentioned."

Wm. & Geo. Leviston, for Appellants.

Having elected to stand on his complaint, the Court has no power to allow him to amend after judgment. (*People v. Jackson*, 24 Cal. 633; *Sutter v. San Francisco*, 36 id. 116; *McKinley v. Tuttle*, 34 id. 239.) Plaintiff knew of the alleged mistake, four or five months before suit was brought, and fails to state if he informed his counsel in that regard. If he did, and failed to set it up, his remedy is against them. (*Sampson v. Ohleyer*, 22 Cal. 210; *Hancock v. Pico*, 40 id. 153, and cases cited; *Smith v. Tunstead*, 56 id. 177, and cases cited; *Boyd v. Blankman*, 29 id. 43; C. C. P. § 1962.)

Lloyd, Newlands & Wood, and *W. C. Burnett*, for Respondent.

The information given plaintiff before the commencement

of this suit was, that the "mortgage" provided that the interest should be added to the principal, not that the "note" so provided, and was not such as necessarily to cause plaintiff to speak to his attorney about that matter when commencing suit. Mr. Mone drew the original complaint from the note and mortgage, not having been informed of the mistake, while plaintiff supposed the note and mortgage to have been drawn as agreed upon, and had not, therefore, given him, or plaintiff's attorneys, any information concerning the terms of the agreement not embodied in those instruments.

MORRISON, C. J.:

Plaintiff brought this suit to foreclose a mortgage, and defendants demurred to the complaint. The demurrer was sustained and leave was given to amend within ten days. Notice of the order was duly served on plaintiff, but he failed to amend his complaint, and final judgment was entered against him on the twenty-ninth day of January, 1880. On the seventh of April of the same year notice was served on defendants' attorney that plaintiff would move on Friday, the sixteenth day of that month, for an order, "relieving him from the order for judgment heretofore entered in said action on or about the twenty-ninth day of January, 1880, and the judgment heretofore rendered in favor of said defendant, Neumann and against said plaintiff, and setting the same aside on the ground that the same were taken and had against the plaintiff through his mistake, and also through his inadvertence and surprise, and his excusable neglect; and also for an order herein allowing the plaintiff to make and file herein an amended complaint, on the ground of mistake and inadvertence on the part of said plaintiff."

It was claimed there was a mistake in drawing the note to secure which the mortgage was given, inasmuch as by the terms of the note it was provided that the same should draw interest at the rate of eight per cent. per annum until paid, "and if not so paid, then the interest to be added to and become a part of the principal sum, and thereafter bear a like interest." The note was dated January 17, 1878, and was payable five years after date. The claim on behalf of plaintiff is

that the mistake consisted in leaving out of the note the words: "*the interest payable monthly in advance.*"

On the affidavits filed in the case, the Court below set aside the final judgment on the demurrer and allowed the plaintiff to file an amended complaint. From this order, made after final judgment, this appeal is taken.

It is unnecessary for us to determine in the present case, whether such practice is to be sanctioned in *any* case, but assuming that the Court may, in a proper case, grant relief against a final judgment on demurrer, the circumstances attending the case in hand did not justify such action.

The mistake complained of was apparent on the face of the note, and was as clear on the day the note was executed, and at all other times thereafter, as it was when application was made for leave to file the amended complaint. But, in addition to this, it appears from the affidavit of the plaintiff himself, made on the hearing of the motion, that plaintiff was informed of the mistake, and had his attention called thereto *four months* before the commencement of the action.

We think that the plaintiff failed to make out such a case of mistake, surprise or excusable neglect as justified the Court below in setting aside the final judgment on demurrer, and the order to that effect, as well as the order granting plaintiff leave to file an amended complaint is reversed.

MYRICK and SHARPSTEIN, JJ., concurred.

[No. 7,184.—Department Two.]
April 4, 1882.

C. H. PARKER v. LUDWIG ALTSCHUL ET AL.

PRESUMPTIONS IN FAVOR OF JUDGMENT—ACTION ON STREET ASSESSMENT—DISMISSAL OF PARTIES DEFENDANT.—A decree for the plaintiff in an action to foreclose a lien for street assessments, recited that the action was dismissed as to some of the defendants. The defendant appealed upon the judgment roll.

Held: All presumptions are in favor of the correctness of the proceedings of Courts of general jurisdiction, and as the consent of the defendants

would have justified the order, we must presume that such consent was given, there being nothing in the record to show that it was not.

ID.—ID.—ID.—CASES DISTINGUISHED.—*Clark v. Porter*, 53 Cal. 409; *Diggins v. Reay*, 54 Id. 525; *Harney v. Applegate*, 57 Id. 205; *Tobleman v. Roper*, 7 P. C. L. J. 56; distinguished.

APPEAL by defendant Elizabeth McGrath from a judgment for the plaintiff in the Fourth District Court of the City and County of San Francisco. MORRISON, J.

A petition for hearing in bank was filed in this case after judgment and denied.

E. A. Lawrence, for Appellant.

The judgment is erroneous because not entered against all of the owners. The complaint should have been amended so as to show that the persons dismissed were not owners. (*Clark v. Porter*, 53 Cal. 409; *Harney v. Applegate*, 57 Id. 205; *Diggins v. Reay*, 54 Id. 525; *Tobleman v. Roper*, 7 Id. 561.)

John J. Roche, for Respondent.

No brief on file for Respondent.

THE COURT:

The decree recites that the action was dismissed as to some of the defendants. If any of the other defendants had objected to such dismissal, it would seem upon the authority of *Clark v. Porter*, 53 Cal. 409; *Diggins v. Reay*, 54 Cal. 525; *Harney v. Applegate*, 57 Cal. 205; *Tobleman v. Roper*, 7 P. C. L. J. 561, that the objection would have been well taken. But for anything appearing to the contrary such dismissal may have been consented to by the appellant.

All presumptions are in favor of the correctness of the proceedings of courts of general jurisdiction, and as the consent of the defendants would have justified the order of the Court, we must presume that such consent was given, there being nothing in the record to show that it was not.

Judgment affirmed.

[No. 10,718.—In Bank.]
April 4, 1882.

THE PEOPLE v. FRANCIS DE CLEER.

ASSAULT WITH INTENT TO MURDER—INDICTMENT—MISNOMER—ALIAS—VERDICT—INSANITY—INSTRUCTIONS.

APPEAL from a judgment of conviction, from an order denying an arrest of judgment and from an order refusing a new trial in the Superior Court of the City and County of San Francisco. FREELON, J.

The indictment charged that defendant on the nineteenth day of April, A. D., 1879, at the said City and County of San Francisco, unlawfully, feloniously, and with malice aforethought, with a deadly weapon, namely, a pistol, upon the body of one Victoria DeCleer, *alias* Victorie DeCleer, *alias* Victoire DeCleer, *alias* Victoria Bacon, *alias* Victorie Bacon, *alias* Victoire Bacon, in the place then and there being did make an assault; and her, the said Victoria DeCleer, *alias* Victorie DeCleer, *alias* Victoire DeCleer, *alias* Victoria Bacon, *alias* Victorie Bacon, *alias* Victoire Bacon, did then and there shoot and wound with the unlawful and felonious intent then, there and thereby, her the said Victoria DeCleer, *alias* Victorie DeCleer, *alias* Victoire DeCleer, *alias* Victoria Bacon, *alias* Victorie Bacon, *alias* Victoire Bacon, wilfully and of his malice aforethought to kill and murder contrary to the former force and effect of the statute, etc.

L. Quint, for Appellant.

A. L. Hart, Attorney General, for Respondent.

MORRISON, C. J.:

1. The demurrer to the indictment was properly overruled, as it contained all the averments essential to a charge of assault with intent to murder. (Wharton's Precedents of Indictments and Pleas, 242.)

2. The party upon whom the assault was made was described by several aliases, and the evidence shows that one of the names given her in the indictment was her true name.

3. The verdict "Guilty as charged in the indictment," was sufficiently certain, and was good in law. (*People v. Gilbert*, 57 Cal. 96.)

4. The charge to the jury was unobjectionable, in view of all the evidence in the case. There was nothing in the evidence to sustain the plea of insanity, and it would have been a mockery of justice if the jury had acquitted the defendant on that ground. It was a plea set up in the absence of all matter tending to show an excuse or justification for the attempted murder, and such pleas are not to be encouraged in Courts of justice.

5. There was no error in the refusal to give instructions asked by the defendant, as all the points contained in them, proper to be given to the jury, were embraced in the charge of the Court. The Court is not required to state the law to the jury more than once.

There is no substantial error apparent in the record.

The judgment and order are, therefore, affirmed.

MYRICK, MCKINSTRY, ROSS, and MCKEE, JJ., concurred.

[No. 7,107.—In Bank.]

April 5, 1882.

J. J. CUMMINGS v. P. W. DUDLEY ET AL.

SALE VARIANCE—PLEADING—EVIDENCE.—The complaint contained two counts, the first alleging the sale of a horse to the defendants for the sum of one thousand five hundred dollars; the second, that the defendants were indebted to the plaintiff in that sum on account of a horse delivered to them by the plaintiff at their request, which (it was alleged) was reasonably worth one thousand five hundred dollars. The proof was that the defendants agreed to give the plaintiff for the horse seven hundred and fifty dollars in money and seven hundred and fifty in horses, and that the plaintiff sold and delivered the horse to the defendant on those terms.

Held: The plaintiff ought to have counted on the agreement to deliver the horses as well as the agreement to pay the money; but as no objection was made to the proof, as to the contract on the ground of variance or otherwise, the error was waived.

ID.—PROMISE TO PAY IN SPECIFIC ARTICLES—DAMAGES.—Where a party agrees to deliver specific property at all events, without any option on

his part, and he fails to carry out the contract, he is liable in damages for the value of the property.

ID.—ID.—ID.—LIQUIDATED DAMAGES.—The amount fixed in the agreement of sale in lieu of which the horses were to be delivered, should be treated as liquidated damages.

APPEAL by defendant Dudley from a judgment for the plaintiff and from an order denying a new trial in the Fourth District Court of the City and County of San Francisco. BOOKER, J.

Terry, McKinne & Terry, for Appellant.

Phillip G. Galpin, for Respondent.

ROSS, J.:

The complaint contains two counts: The first alleges that on or about the eleventh of October, 1878, at the county of Stanislaus, the plaintiff sold and delivered to the defendants a certain horse for the sum of fifteen hundred dollars in gold coin, which sum the defendants promised to pay plaintiff therefor, but have failed to pay any part thereof except the sum of one hundred dollars, which they paid on account.

The second count alleges that on the said eleventh day of October the defendants were indebted to the plaintiff in the sum of fifteen hundred dollars on account of the said horse delivered to defendants at their request, which horse, it is averred, was reasonably worth that sum, and no part of which has been paid, except the sum of one hundred dollars.

The proof on the part of the plaintiff is to the effect that defendants refused to give him fifteen hundred dollars in money for the horse, but agreed to give him seven hundred and fifty dollars in money and seven hundred and fifty dollars in horses to be appraised in a certain way; and that the plaintiff sold and delivered the horse to the defendants on those terms. By the contract of sale no time was fixed for the payment of the seven hundred and fifty dollars in money or the delivery of the horses.

From this statement it is obvious that neither count of the complaint stated the contract; for it is not true, as stated in the first count, that the plaintiff sold and delivered to the defendants the horse for the sum of fifteen hundred dollars

in gold coin; nor is it true, as stated in the second count, that at the time of the sale, to wit, October 11, 1878, the defendants were indebted to the plaintiff on account of the sale and delivery of the horse in the sum of fifteen hundred dollars. The learned counsel for the respondent has referred us to a number of cases, and we have found numerous others, in which actions have been maintained for the money or notes giving to the promisor the option to pay in specific chattels and where he has neglected to exercise the option. But in those cases the declaration averred what the contract was. Thus: *Plowman v. Riddle*, 7 Ala. 775, was an action in which the plaintiff declared on a promissory note for three hundred dollars, which contained a provision that the payors might discharge it in good leather of certain specified kind and at certain rates, and the Court very properly held that the privilege was for the benefit of the payors, and that it was their duty, if they elected to deliver the leather in discharge of their contract, to give notice to the plaintiff of their readiness and willingness to do so. Having failed in that duty, the contract to pay the money became absolute.

In *Stewart v. Donnelly*, 4 Yerger, 177, the note was for eight thousand eight hundred and ninety-nine dollars and two cents, payable November 1, 1824, and contained a provision that it might be discharged in salt. The Court properly held, that payment in salt not having been made by the day, the privilege was forfeited, and the plaintiff was not bound afterwards to receive the salt.

Townsend v. Wells, 3 Day, 327, was an action on a note for eighty dollars, to be paid in good West India rum, sugar or molasses, at the election of the payee, within eight days after date. It was held to be unnecessary to aver that the payee had made his election and given notice thereof to the payor, as the latter was bound, at all events, to make payment within eight days in one of the articles specified, and that, failing to do so, the contract to pay the money became absolute.

In *Wiley v. Shoemaker*, 2 Greene (Iowa), 205, the note was made payable one day after date in flour. It was held that when due, the note became to the holder the same as a cash note, and that a demand of the flour was not necessary to enable the holder to recover.

In *Church v. Feterow*, 2 Penn., 301, it was held that when a note is given for the payment of a certain sum, in furniture or other specific articles within a stated time, the payor has an election to satisfy the note in such specific articles or in money, until the time of payment, but after that day is past, his election is gone, and the payee's right to demand money becomes absolute. So, also, was it held in *Vanhooser v. Logan*, 3 Scam. 388, where the note was for three hundred dollars and fifty cents, payable in cattle at a certain day.

Fleming v. Potter, 7 Watts, 380, was a suit on a note by which the defendants promised to pay forty dollars in castings or plows at their furnace, by a certain date. It was held that, to defeat the plaintiff's action, the defendants should have shown a readiness, at the time and place stated, and a continued readiness to deliver the articles; otherwise plaintiff rightly recovered the money.

The other cases cited by counsel are similar. In all of them the complaint set out what the contract was, and inasmuch as it was made to appear that the respective defendants had not exercised their option to pay in the specific chattels within the time stated, the law rightly held them from that time forth bound to pay the money.

To the same effect are a number of other cases cited by Mr. Freeman in a note to the case of *Roberts v. Beatty*, 21 American Decisions, p. 424.

On the other hand, where according to the agreement of the parties the promisor is to deliver the specific property at all events, without any option on his part, and he fails to carry out the contract, we understand the correct rule to be that he is liable in damages for the value of the property. (3 Pars. Con. 215; *Pinney v. Gleason*, 5 Wend. 393; S. C., 21 Am. Dec. 223.)

In the case before us it appears from the plaintiff's own proof that the defendants were unwilling to pay fifteen hundred dollars in money for the horse, and that it was the distinct agreement of both parties that one half of the purchase price was to be paid in horses. We therefore adhere to the views expressed when this case was before Department One of this Court, to the effect that the plaintiff ought to have counted on the agreement to deliver the horses, as well as the

agreement to pay the money. The amount fixed in the agreement of sale in lieu of which the horses were to be delivered would be treated as liquidated damages, inasmuch as no time was fixed for the delivery of the horses, and no specified horses agreed on.

But while we hold to the views above expressed, we will affirm the judgment and order of the Court below, because the proof on the part of the plaintiff as to the contract was not objected to as inadmissible under the pleadings nor on any other ground, and because from the case as made by the plaintiff and sustained by the jury and the Court below, the judgment is for the right amount.

Judgment and order affirmed.

McKINSTRY, THORNTON, and MYRICK, JJ., concurred.

[No. 7,623.—In Bank.]

April 5, 1882.

FARMERS' NATIONAL GOLD BANK v. HENRY STOVER ET AL.

PROMISSORY NOTE—SURETIES—PLEADING.—In an action upon a promissory note signed by S. and L. & S., the latter pleaded that they executed the note as sureties of, and for his accommodation, which fact the plaintiff well knew.

Held: This is not an issuable averment that the defendants contracted with the bank in the capacity of sureties for their co-obligor; it was incumbent upon them in order to set up the defense (under § 2832 C.C.), that they executed the note as sureties, to aver and prove that the payee of the note not only knew of the fact of suretyship between them and their co-obligor, but consented to deal with them in that capacity.

ID.—NATIONAL BANKS—INTEREST.—It is no defense to an action on a note made to a national bank, that the bank knowingly took a greater rate of interest than allowed by law; the remedy in such a case is to recover back twice the amount paid.

ID.—ID.—ID.—National Banks in this State may charge and receive such rates of interest as may be agreed upon in writing, pursuant to § 1918 C. C.

ID.—PAYMENT—NOVATION—VARIANCE—AMENDMENT OF PLEADING.—Under the issue of payment, evidence was introduced by L. & S. tending to prove that S. executed and that the bank took as a substitution for and in full payment and satisfaction of the note sued on, his individual note secured by mortgage on his homestead and other property, and the evi-

dence being objected to as inadmissible under the pleadings, asked leave to amend their answer so as to allege the facts proven by the evidence; but the Court excluded the evidence and denied the motion to an end.

Held: If the note and mortgage were in fact taken as a substitute for the note in dispute with the intent of extinguishing the obligation of it or releasing the parties to it, the transaction constituted a defense by way of novation under §§ 1530-32 C. C.; and conceding the evidence to have been inadmissible under the plea of payment, the Court should have allowed the pleadings to be amended so as to conform to the facts proved by it.

AMENDMENT—DISCRETION OF COURT.—When, in the course of a trial, it is discovered that pleadings are so defective that the real subject of dispute cannot be finally determined, the Court, if an application is made therefor, should allow amendments on such terms as may be just.

ID.—ID.—The fact that the new matter set up by way of amendment was known to the defendant at the time of filing his original answer, is no good reason why the amendment should not be permitted.

ID.—ID.—An amendment of pleadings should be allowed at any stage of the trial when it is necessary for the purposes of justice, and whenever it is not done, it is error.

APPEAL from a judgment for the plaintiff in the Superior Court of Santa Clara County.

W. L. Gill and Burt & Fister, for Appellants.

The facts set forth in the second defense of appellants' answer constituted a defense to the action, and the Court erred in sustaining the demurrer of plaintiff to it. The defense alleges that Luther & Schroeder executed the note as sureties, and for the accommodation of Stover, and not as principal debtors. Giving the case of *Harlan v. Ely*, 55 Cal. 340, its widest scope, the allegations of the defense made appellants sureties as to the plaintiff and the extension discharged them. (Parsons on bills and notes, Vol. i, (2nd Ed.) 233, 234, and note (e).)

This is shown by Sections 2831 and 2832 of the Civil Code when read together. That Section 2831 contemplates only the relative positions of the party becoming responsible, and the party for whose benefit the responsibility is assumed toward each other, in order to determine whether a person is a surety as known to our statutes, is shown by section 2832 where it says that a party who is a surety in fact, though apparently a principal debtor, may show that he is a surety [evidently for the purpose of insisting upon his rights as such] "except as

against persons who have acted on the faith of his apparent character of principal."

With deference to the Court, it seems to us that the case of *Harlan v. Ely*, has placed a wrong construction upon § 2832 of our Civil Code, and that the error should be corrected on the appeal in this case.

That national banks have no right to charge interest when carrying on business in this State at a greater rate than seven per centum per annum, we think established by the authorities of appellant in the case of *Hinds v. Marmalejo*, to be argued with this case, and we are unable to add anything to the points made and authorities cited by the learned counsel for the appellant in that action, except that the case of *Johnson v. Bank of Glover Dale*, cited by appellant in that action has been, according to newspaper reports, affirmed by the Supreme Court of the U. S. to which an appeal was taken. (*Lucas v. Government Nat. B'k of Pottsville*, 78 Pa. St. 228; *Overholt v. Nat. B'k of Mount Pleasant*, 82 id. 490; *Cake v. First Nat. B'k of Lebanon*, The Reporter, vol. 5, 509; *Archer v. McCray*, id. 686; *Nat. B'k of Auburn v. Lewis*, The Reporter, vol. 8, 84; *Nat. B'k of Winterset v. Eyre*, The Reporter, vol. 9, 83; *Bank v. Slemmons*, The Reporter, vol. 7, 118; *Wilkinson v. Wooten*, The Reporter, vol. 6, 197; *Walter v. Breisch*, id. 30; *Treadwell v. Archer*, The Reporter, vol. 7, 691; *Nat. B'k of Madison v. Davis*, The Reporter, vol. 5, 258; *First Nat. B'k of Peterborough v. Childs*, The Reporter, vol. 11, 637; *Moniteau Nat. B'k v. Miller*, id. 847.) The Court erred in sustaining the objection to the admission of the evidence offered by the appellants to prove payment of the note sued on herein, by the note and mortgage of Stover, dated February 14, 1878, for the testimony was admissible under the denial of nonpayment.

The allegation of nonpayment meant more than nonpayment in money merely; it meant nonpayment in any species of property. (*Brown v. Orr*, 29 Cal. 120; *Wetmore v. San Francisco*, 44 id. 301; *Davanay v. Eggenhoff*, 43 id. 397; *Frisch v. Caler*, 21 id. 71; *Bliss on C. P.*, §§ 357, 358; *Boyd v. Weeks*, 2 Denio, 322; *Wheeler v. Billings*, 38 N. Y. 263; *Greenfield v. Mass. Life Ins. Co.*, 47 id. 430; *Farmers' and Citizens' B'k v. Sherman*, 6 Bosw. 181; S. C., 33 id. 69; *Wait's*

Actions and Defenses, vol. 7, p. 423, citing *Hamilton v. Moore*, 4 Watts. & Serg. 570.)

If the Court did not err in excluding the testimony, it was an abuse of discretion to deny appellant's motion to amend. (C. C. P. § 473; *Polk et al. v. Coffin et al.* 9 Cal. 56; *Stringer v. Davis*, 30 id. 320; *Bell v. Knowles*, 45 id. 194; *Lestrade v. Barth*, 17 id. 286; *Roland v. Kreyenhagen*, 18 id. 455.)

Geo. F. Baker, for Respondent.

It was not error to refuse to allow appellants to introduce evidence showing an accord and satisfaction when payment only was pleaded. According to the definition of "payment," adopted by our Code, it is clear that when payment is alleged or claimed, nothing can be shown but delivery of money in performance of the obligation. (C. C. § 1478; *Manice v. H. R. R. Co.*, 3 Duer, 441; *Coles v. Soulsby*, 21 Cal. 47; *Moss v. Shear*, 30 id. 472.)

The Court below did not err in refusing to allow appellants' motion to amend their pleading so as to show an accord and satisfaction. Such a motion is addressed to the sound legal discretion of the Court, and its ruling will not be regarded as error unless there should be an abuse of discretion. (*Harding v. Minear*, 54 Cal. 502.)

The evidence offered by appellants would not support the allegations of the proposed amendment, and the denial of appellant's motion did them no wrong. In a very recent case this Court has decided that an accord without satisfaction does not constitute a good defense to an action upon the original obligation. (*Simmons v. Hamilton*, 56 Cal. 493.)

No presumptions are allowed in support of such a case as appellants wished to make out, but it must rest in very strong evidence. (2 Parson's Notes and Bills, 164; *Hutchings v. Castle*, 48 Cal. 152.)

All the authorities negative the proposition of any payment or satisfaction of the note in suit. (*Okie v. Spencer*, 2 Whart. 253; *Tarleton v. Allhusen*, 2 A. & E. 32; *Olcott v. Rathbone*, 5 Wend. 490; *Pratt v. Foote*, 12 Barb. 209; *Lumley v. Musgrave*, 4 Bing. N. C. 9; S. C., 5 Scott, 230; 2 Parson's Contracts, 685.)

But it is contended that appellants were merely sureties, and are not liable as principals. This position cannot be maintained under the Code. They are estopped to deny that they are principals. (Civil Code, Sec. 2832; *Harlan v. Ely*, 55 Cal. 340.)

In this State national banks may charge and receive such rate of interest as may be agreed upon in writing. (*Tiffany v. Nat. Bank of Mo.*, 18 Wall. U. S. 413; Rev. Stat. U. S., Sec. 5197; C. C. §§ 1918, 1917; *Wiley v. Starbuck*, 44 Ind. 304; *Newell v. Nat. Bank of Somerset*, 12 Bush (Ky.), 60, 61.)

McKEE, J.:

Action to recover balance due upon the following promissory note:

"\$2,000.

SAN JOSE, December 24, 1877.

"On March 24, 1878, at three o'clock P. M., on that day (no grace), for value received, in gold coin of the Government of the United States, we, or either of us, promise to pay to the order of Farmers' National Gold Bank, in this city, two thousand dollars, with interest from date at the rate of 1½ per cent per month until paid, payable monthly; both principal and interest payable alike in gold coin.

"H. STOVER,

"LUTHER & SCHROEDER."

Stover made default: Luther & Schroeder plead: 1. Payment. 2. Execution of the note by them as sureties for Stover, and subsequent release. 3. Negligent forbearance to sue their principal when solvent. 4. Willful violation by the plaintiff of the law of Congress under which plaintiff had organized, in charging and collecting usurious rates of interest. 5. A counter-claim.

To the counter-claim and all the defenses set up in the answer a demurrer was interposed by the plaintiff, and was sustained by the Court, except as to the plea of payment. Counsel for defendants concede that the demurrer was properly sustained as to the third defense and the counter-claim, but contend that it was improperly sustained as to the second and fourth defenses. But the ruling of the Court was correct as to the second defense, because the facts alleged in the

answer were insufficient to constitute the defense. The allegation of the answer is, "that the defendants executed the note as sureties of Stover and for his accommodation, which fact the plaintiff well knew." That is not an issuable averment that the defendants contracted with the bank, at the time of the execution and delivery of the note, in the capacity of sureties for their co-obligor. The mere fact that the bank knew that the relation of sureties and principal existed between them and Stover, does not, in itself, show that the bank consented to deal with them in the capacity of sureties. According to the face of the note the bank dealt with them as principals only; for as such they apparently executed and delivered the note. If, in fact, however, the bank dealt with them in a different capacity—as sureties and not as principals—it is incumbent upon them, where they seek, under Section 2832 of the Civil Code, to set up as a defense to an action upon the note, that they executed it as sureties, to aver and prove that the payee of the note not only knew of the fact of suretyship between them and their co-obligor, but consented to deal with them in that capacity; for all the parties to a contract must agree upon the same thing in the same sense. (§ 1580 C. C.) In the absence of issuable averments of facts showing such a contract between them and the plaintiff, the pleading is demurrable.

As to the fourth defense, it appears by the answer, that the note in controversy is the last of a series of twelve notes, each of which, except the first, had been given by the same parties for the same capital sum, in renewal of its preceding note; and upon the execution and delivery of the renewal note and the payment of interest due upon its preceding note, the preceding note itself was cancelled and surrendered. The first note of the series was given in September, 1874. A renewal note was given every few months thereafter; and the bank charged and collected at the time of each renewal, interest on the preceding note at the rate of one and a quarter per cent. per month until February 15, 1877, when, by an agreement between plaintiff and Stover, the rate was reduced to one per cent. per month.

Assuming for the purposes of the demurrer, that the bank knowingly took and was paid a greater rate of interest than

that allowed by the law of the State, that did not constitute a defense to the action, either by way of set-off or payment of the promissory note in suit. "The remedy given by the statute for the wrong," say the Supreme Court of the United States, in *Barnet v. National Bank*, 98 U. S. 555, "is a penal suit. To that the party aggrieved must resort. He can have redress in no other mode or form of procedure." And in the *National Bank of Auburn v. Lewis*, 81 N. Y. 15, it was held, that, in an action brought to recover the amount of a promissory note discounted by a national bank, it is not allowable to set up, by way of counter-claim or set-off, that the bank in discounting a series of notes, the proceeds of which were used to pay other notes, knowingly took a greater rate of interest than allowed by law. The remedy in such a case is to recover back twice the amount paid.

Besides, in *Hinds v. Marmolejo*, ante, 229, we have held that national banks in this State may have, charge, and receive such rate of interest as may be agreed upon in writing pursuant to Section 1918 of the Civil Code. The demurrer as to those defenses, was, therefore, properly sustained.

On the issue of payment the parties went to trial. At the trial defendants gave evidence which tended to prove that in February, 1878, soon after the execution and delivery of the note in suit, and before it became due, Luther & Schroeder became insolvent. Upon the happening of that event, the Cashier of the bank called upon Stover to know what he was going to do about payment of the note. Stover, although the note was not due, proposed to give for it his individual note secured by mortgages if the bank would reduce the rate of interest to one per cent. per month. The proposal seems to have been accepted, for, in pursuance of it, Stover executed and delivered to the bank his individual note for two thousand dollars, with interest at one per cent per month, payable one year after date, and as security for its payment, executed and recorded for the bank a mortgage upon his homestead and other property. That mortgage after it was recorded, he delivered to the bank, February 15, 1878, and demanded a surrender of the old note—the note in controversy—which the bank refused, on the ground, "that it

was not customary for banks to give up notes until they became due."

Under those circumstances the note remained in the bank—the bank inserting at the foot of it in red ink: "To bear interest at one per cent per month from February 15, 1878." When the note became due Stover did not demand its surrender; the bank did not cancel or surrender it, nor were any steps taken to enforce it against the makers, until after the Stover note became due, when the bank foreclosed the Stover mortgage, sold the mortgaged premises under the decree of foreclosure, applied the proceeds of the sale towards the satisfaction of the decree, and, also, as a credit upon the note in suit; had judgment entered against Stover for the deficiency, and then brought this action upon the note in controversy.

To this evidence plaintiff's counsel objected that it was inadmissible under the pleadings. When the objection was made, defendants' counsel moved the Court for leave to amend their answer by inserting the following:

"For another and separate defense herein, said defendants aver and allege: That on the fourteenth day of February, A. D., 1878, their co-defendant, Henry Stover, who was also their co-maker in the note sued on herein, at the request of the plaintiff, executed and delivered to one W. D. Tinsdale, the agent and cashier of plaintiff, his, said Stover's promissory note, secured by a mortgage upon certain real estate in the city of San Jose, county of Santa Clara, State of California, belonging to said Stover, which said note was for two thousand dollars, gold coin of the United States, payable one year after date thereof, with interest at the rate of one per cent. per month from date until paid.

"That it was expressly agreed by said plaintiff and said Stover that said note and the mortgage security were taken by plaintiff as a substitution for, and in full payment and satisfaction of, the note sued on herein.

"That these defendants, so far as they were concerned, fully ratified and confirmed the aforesaid acts of Stover in regard to the payment of the said note sued on herein, long before the commencement of this action."

The Court reserved the motion, permitted the evidence to be given, but, at the close of defendants' case, excluded the

evidence and denied the motion to amend, upon the ground that "the defense was one which did not commend itself to the justice of the Court;" and, upon motion of the plaintiff, the evidence was stricken out, and the jury directed to return a verdict for the plaintiff, which was done.

This was error. The evidence which was admitted and afterwards excluded, tended to prove that the bank had accepted the individual note and mortgage of Stover as a substitute for the note in suit, for the purpose of extinguishing the obligation arising from it, or of releasing the parties to it who had become insolvent. If the note and mortgage were, in fact, taken as a substitute for the note in dispute, with the intent of extinguishing the obligation of it, or releasing the parties to it, the transaction constituted a defense by way of novation, under Sections 1530, 1531, 1532 of the Civil Code; and the defendants were entitled to have it presented to the consideration of the jury upon the evidence adduced to sustain it. It may be conceded that the issue was not properly framed so as to admit of the evidence, yet, as it had been offered and was admitted, the Court should have allowed the pleadings to be amended so as to conform to the facts proved by it.

In *Kirstein v. Madden*, 38 Cal. 158, where the denials of the answer on file were insufficient to raise an issue, and the plaintiff moved for judgment on the pleadings, which was met by a counter motion to file an amended answer, the trial Court refused leave to amend, and entered judgment for the plaintiff. That judgment the Supreme Court reversed, saying: "We think the defendant ought to have been permitted to amend his answer. From oversights of counsel committed under pressure of business, pleadings are often defective. In such cases, when an offer to amend is made, at such a stage in the proceedings that the other party will not lose an opportunity to fairly present his own case, amendments should be allowed with great liberality."

In *Stringer v. Davis*, 30 id. 318, it is said: "When in the course of a trial it is discovered that pleadings are so defective that the real subject of dispute cannot be finally determined, the Court, if an application is made therefor, should allow amendments on such terms as may be just." The fact

that the new matter set up by way of amendment was known to the defendant at the time of filing his original answer, is no good reason why the amendment should not be permitted. (*Pierson v. McCahill*, 22 Cal. 127.) An amendment of pleadings should be allowed at any stage of the trial when it is necessary for the purposes of justice. (*Peters v. Foss*, 16 Cal. 357; *Lestrade v. Barth*, 19 id. 660;) and whenever it is not done, it is error. (*Connalley v. Peck*, 3 Cal. 82; *Tyron v. Sutton*, 13 Id. 494; *Hooper v. Wells, Fargo & Co.*, 27 Id. 35.)

Judgment reversed and cause remanded.

MORRISON, C. J., and ROSS, MCKINSTREY, MYRICK, and SHARPSTEIN. JJ. concurred.

[No. 6,741.—In Bank.]

April 5, 1882.

NICHOLAS HAYES v. C. H. WETHERBEE ET AL.

CONSTRUCTION OF DEED—DESCRIPTION OF LAND.—P. the owner of an undivided tenth part of a tract of land executed to S. a deed containing the following description of the property conveyed: "All of the grantor's right, title and interest in the following described property, viz: One half interest in that right, title and interest of the party of the first part in and to an undivided one tenth part of that certain tract or parcel of land," etc. S. executed a deed to T. containing the following description: "All his right, title, interest, etc., in the following property, to wit: One half interest in that right, title and interest of the party of the first part in and to an undivided one tenth part of that certain tract or parcel of land," etc.

Held: The latter deed conveyed an undivided one half only of the interest of S.—that is to say an undivided one fortieth of the land.

Id.—Id.—It is a principle in the construction of releases, and the reason of the rule extends to grants and conveyances of land, that a release in general words shall be restrained to the particular occasion; and that where there are general words alone in a deed of release, they shall be taken most strongly against the releasor; but when there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the particular recital.

FINDINGS—ADDITIONAL FINDINGS—JURISDICTION.—The Court filed its findings July 12, 1877, and on the thirty-first of July, 1877 (prior to the entry of judgment) filed additional findings reciting that having through inadvertence failed to find upon all the issues herein—it now of its own motion made and filed the additional findings. *Held:* The additional findings were not improperly filed.

Id.—Id.—Id.—CASE DISTINGUISHED.—*Baggs v. Smith*, 53 Cal. 88, distinguished.

APPEAL from an order denying defendant's motion for a new trial in the Third District Court of the City and County of San Francisco. MCKEE, J.

Wallace & Hastings and *W. W. Cope*, for Appellants.

This construction violates the rule of interpretation that in effect should, if possible, be given to every part of an instrument. (C. C. §§ 1638-1641; 2 Parsons on Cont. marginal page 505; Brooms' Legal Maxims, 414; *Jackson v. Stevens*, 16 Johnson, 110).

The Court erred in filing additional findings after the filing of the original finding, and after the entry of judgment thereon. (*Prince v. Lynch*, 38 Cal. 528; *Baggs v. Smith*, 53 id. 90; *Ogburn v. Connor*, 46 id. 354.)

William N. Pierson, for Respondent.

The plaintiff is clearly the owner of one twentieth. The deed from Siebeck to Ten Broeck conveys "one half interest * * * in and to an undivided one tenth part of" the lot in question. By no verbal torture can this mean one fortieth. The description of the interest conveyed is a literal copy of the description in the deed from Precht to Siebeck.

It was not error for the Court to make additional finding. (*Hathaway v. Ryan*, 35 Cal. 190; *Bosquett v. Crane*, 51 id. 506; *Ogburn v. Conner*, 46 id. 346.)

SHARPSTEIN, J.:

Plaintiff brought an action of ejectment in one of the late District Courts to recover an undivided interest in certain lots situate in the city and county of San Francisco. On the trial of the case, a deed from James A. McDougall to Charles Precht was introduced in evidence, which deed conveyed an undivided interest of one tenth in the land, and plaintiff also introduced a deed from Charles Precht to one Gustavus Seibeck, containing the following description of the property conveyed: "All of the grantor's right, title and interest in the following described property, viz.: One half interest in that right, title and interest of the party of the first part in and to an undivided one tenth part of that certain tract of parcel of ground," etc. Plaintiff further introduced in evi-

dence a deed from Gustavus Seibeck to one G. W. Ten Broeck, which contained the following description of the property conveyed all his right, title, interest, etc., in and to the following premises, to wit: One half interest in that right, title and interest of the party of the first part, in and to an undivided one tenth part of that certain tract or parcel of ground, etc. The judgment of the Court below was in favor of the plaintiff, for an undivided one twentieth of the land in controversy, and it is claimed, on behalf of the appellant, that the foregoing description vested in Ten Broeck an undivided interest to the extent of one fortieth only.

The deed from McDougall to Precht passed the title to one tenth of the property, and the deed from Precht to Seibeck conveyed an undivided half of that tenth interest, thus vesting in him an interest of *one twentieth*. And the deed from Seibeck to Ten Broeck was for a one half interest in the right, title and interest of the party of the first part "in and to an undivided one tenth part of that certain tract or parcel of land."

In the case of *Jackson v. Stevens*, 16 Johns. 109, a deed somewhat similar in its language was construed by the Supreme Court of New York. The syllabus of the case is that "where a person seised of three undivided fourth parts of a farm, conveys an equal moiety of the farm, describing it by metes and bounds, *together with all the estate, right, title, etc., which he, the grantor, hath to the above described premises*; these general words are not to be construed as extending the grant beyond the moiety of the premises;" and the learned Judge (Spencer), in delivering the opinion of the Court, says: "Upon a fair construction of this deed, it conveys only a moiety of the farm. The deed at first grants one equal undivided half part of the farm, and also all the estate, right, title, etc., 'which he, the said Ebenezer Stevens, hath to the above-described premises, either in law or equity, from the last will and testament of Samuel Stevens, of, etc., deceased.' Now, the described premises were one half of the farm. It is true, the boundaries of the whole farm are mentioned; but the entire farm is not the premises described in the granting part. The one equal undivided half of the farm is there described. It is a principle in the construction of releases, and

the reason of the rule extends to grants and conveyances of lands, that a release in general words shall be restrained to the particular occasion; and that where there are general words alone in a deed of release, they shall be taken most strongly against the releasor; but when there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the particular recital. Technically speaking, the deed contains no recital; but the special object of the deed was to convey one half of the farm, and the general words are thrown in to show how the right of the grantor was derived. It would be doing violence to the deed, and, to the intention of the the parties, to say that it was meant to convey the whole farm."

It is not the entire interest of the grantor Seibeck in the one undivided tenth, which was one twentieth, that was intended to be conveyed, according to the language of this deed, but it is the half interest in "that right, title and interest of the party of the first part" that is described in the granting part of the deed. In order to hold that the deed from Siebeck passed his entire interest in the land we would have to reject the words "one half interest of the party of the first part" and interpolate the words "all my right, title and interest" or words of equivalent meaning. This we cannot do. The language is somewhat obscure, but a fair construction of it leads us to the conclusion that Ten Broeck succeeded to only half of the interest of Siebeck in the land in controversy.

The other point made on this appeal, that the Court had no power to file additional findings, is not well taken. It is true that it was held in the case of *Baggs v. Smith*, 53 Cal. 88, that the Court had no authority to make the further findings; but in that case the additional findings were filed after the case had been appealed to the Supreme Court. The following cases are, however, authority for holding that the further findings in the case were not improperly filed: (*Pratalongo v. Larco*, 47 Cal. 378; *Ogburn v. Connor*, 46 id. 346; *Bosquett v. Crane*, 51 id. 505.)

Order reversed.

ROSS, MCKINSTRY, and MYRICK, JJ., concurred.

[No. 6,941.—In Bank.]

April 6, 1882.

THE PEOPLE, ETC., EX REL., v. HENRY COWELL

TIDE LAND—CERTIFICATE OF PURCHASE—SHORE OF THE SEA—THINGS PUBLIC—ACTION TO QUIET TITLE.—In an action by the State to cancel a certificate of purchase of a tract of tide land issued to the defendant, under the Act of April 27, 1863, the Court, in effect, found that the tract in controversy (which embraces some sixty-eight acres) is a portion of the frontage of the Bay of Monterey, which, for more than twenty-five years has been, and still is, used for commercial and maritime purposes—being that portion of the frontage of the bay at which sea-going vessels trading with Santa Cruz touch and load and unload; that much the greater portion of the land was and is permanently beneath the waters of the bay, and that all of it—except some points and bluffs comprising not over one or two acres—was, at the date of the survey and application, under which the appellant claims, covered by the waters of ordinary tides; that the whole of the tract (except the points and bluffs above referred to) was and is loose drifting sands, shifting with the action of the waves and winds; that none of the tract was, at the time of the survey and application, or is now, of any value for agricultural purposes; and that the cost of reclaiming it would greatly exceed its value when reclaimed for any purpose of tillage and agriculture.

Held: The finding in effect is that the land was not reclaimable for agricultural purposes; and, applying this test the judgment of the Court below annulling and cancelling the certificate must be affirmed.

ID.—SWAMP AND OVERFLOWED LANDS—SURVEY—COUNTY SURVEYOR.—Under Sections 3 and 7 of the Act of April 27, 1863—cited *supra*—the duty of the County Surveyor does not commence, nor can he officially act concerning any application, until the affidavit and application for a survey are officially put before him. A survey made before this is done, is but the survey of a private person and has no official sanction.

APPEAL from a judgment for the plaintiff in the Twentieth District Court, County of Santa Cruz. BELDEN, J.

The action was brought to cancel and annul the approval of a tide land survey made by the Surveyor General on the twelfth day of June, 1868, and the certificate of purchase issued thereon.

E. S. Pillsbury, for Appellant.

The finding of the Court as to the character of the land, does not support the conclusion arrived at; it finds, touching the land in question, that, "The cost of so reclaiming and protecting said tract would greatly exceed its value when re-

claimed for any purpose of tillage or agriculture." In other words, the Court finds that the land is capable of reclamation, but is of opinion that it would be a bad speculation for the purchaser to undertake it. The only test was, is the land reclaimable? (*People v. Morrill*, 26 Cal. 360; *Ward v. Mulford*, 32 Cal. 365; *Connelly v. Mon Chong*, July T. 1872.)

It was the province of the County Surveyor and Surveyor General to determine the character of this land, and their decision, in the absence of fraud, is final, and not subject to review by the Courts.

The proceedings to acquire this land were had under the Act of 1863. (Stat. 1863, 591.) It must be conclusively presumed, from the action of these officers, that this land was subject to sale. (*Stuart v. Haight*, 39 Cal. 87; *Hinckley v. Fowler*, 43 Id. 56; *Porter v. Haight*, 45 Id. 631, 639, 640; *Hoemer v. Wallace*, 47 Id. 461; *Hess v. Bolinger*, 48 Id. 349.)

Wm. T. Wallace, C. R. Greathouse, and Gordon Blanding, for Respondent.

The application of Cowell was to be permitted to purchase about sixty-eight acres of land, the greater part of which was beneath the waters of the bay of Monterey, comprising the harbor of Santa Cruz, and nearly all of it covered by the ordinary tides. It was irreclaimable within the sense of the law authorizing the sale of reclaimable land. The attempt made by Mr. Cowell here, is the same that was unsuccessfully made in *People v. Morrill*, 26 Cal. 336; *Taylor v. Underhill*, 40 id. 473; and *Kimball v. MacPherson*, 46 id. 107, in all which cases was held by this Court, that lands such as these are not and never have been subject to entry and sale under the laws of this State.

It is suggested by the learned counsel for appellant, in the second point of his printed brief that it belonged to the County Surveyor to determine the character of the land applied for, and that his decision that it was reclaimable is final. We do not consider that we are called upon to inquire whether the decision of the County Surveyor, thus claimed to have been made *en pais*, is ordinarily subject to be reviewed in this manner or not. Because, whatever be the true rule in that respect where proceedings before him have been regularly

had, here there were no such proceedings. His official authority, whatever be its nature and scope, was never set in motion. (Act of April 27, 1863, 592.)

Charles B. Younger, also for Respondent.

ROSS, J.:

The principal question in this case is, were the lands in controversy subject to sale under the laws of this State? And as respects this, appellant's counsel says: "The only test was, is the land reclaimable?"

Applying that test, we have no difficulty in affirming the judgment of the Court below. The findings, which are not complained of, show that the tract, which embraces some sixty-eight acres, is a portion of the frontage of the bay of Monterey, which, for more than twenty-five years, has been, and still is, used for commercial and maritime purposes—being that portion of the frontage of the bay at which sea-going vessels trading with Santa Cruz touch, and load and unload; that much the greater portion of the land was, and is, permanently beneath the waters of the bay, and all of it, except some points and bluffs, comprising not over one or two acres, was, at the date of the survey and application under which the appellant claims, covered by the waters of ordinary tides; that the whole of the tract (except the points above referred to) was and is loose, drifting sands, shifting with the action of the waves and winds; that none of the tract was, at the time of the survey and application, or is now, of any value for agricultural purposes—"the only manner in which it could be made available for such purposes being to construct expensive levees or dykes, and transport to and cover it with soil," and that the cost of so reclaiming and protecting the tract would greatly exceed its value when reclaimed for any purpose of tillage or agriculture.

The idea that land thus situated is reclaimable for agricultural purposes would at once strike any one off the bench as preposterous. We know of no reason why we should not enjoy the privilege of exercising a little common sense and take the same view of it.

The suggestion of the counsel for appellant, that we are

bound by the determination of the County Surveyor as to the character of the land, is without force. As is well said for the respondent, the official authority of the Surveyor, whatever be its nature and scope, was never set in motion. From Sections 3 and 7 of the Act under which appellant's proceedings were had—Act of April 27, 1863, p. 592—it will be seen that the duty of the County Surveyor does not commence, nor can he officially act concerning any application, until the affidavit and application for a survey are officially put before him. In the present case the survey was made five days before appellant made any application therefor or had taken or subscribed the affidavit required by the act. The survey, therefore, was but the survey of a private person and had no official sanction.

The other points made it is not necessary to consider.
Judgment affirmed.

McKINSTRY, J., MORRISON, C. J., and McKEE, THORNTON, and SHARPSTEIN, JJ., concurred.

MYRICK, J., concurred in the judgment on the ground last above stated

[No. 6,712.—In Bank.]
April 7, 1882.

SWAMP AND OVERFLOWED LAND DISTRICT No. 110
IN AND FOR SAN JOAQUIN COUNTY v. CHRISTIAN
FECK ET AL.

DEMURRER—COMPLAINT—CAPACITY TO SUE.—The objection that it does not appear from the complaint, that the plaintiff was ever duly created a swamp and overflowed land district, goes to the legal capacity of the plaintiff to sue, and not to the sufficiency of the facts stated to constitute a cause of action.

ID.—ID.—ID.—ANSWER.—It is not a good ground of demurrer that it does not appear in the complaint that the plaintiff had the legal capacity to sue. The omission can only be taken advantage of by answer.

SWAMP LAND ASSESSMENT—RECLAMATION—JOINDER OF ACTIONS.—Two assessments for reclamation purposes in a swamp land district made on the same land at different times may be recovered in the same action.

ID.—ID.—CASE DISTINGUISHED.—*Dyer v. Barstow*, 50 Cal. 652, is not a parallel case.

Id.—Id.—ESTIMATE OF WORK.—Neither the Board of Trustees of a swamp land district, nor its engineer, has authority to include in its estimate of the cost of work necessary for reclamation the value of work done before the Board had any existence.

Id.—Id.—Id.—BY-LAW.—A by-law providing that the value of work already done should be included in such estimate is inconsistent with the provisions of the Code upon the subject.

APPEAL from a judgment for the defendants, Christian Feck and The Stockton Building and Loan Association, in the Fifth District Court of the County of San Joaquin.

Vincent Neale, for Appellant.

The first cause of demurrer attacks the creation of the plaintiff corporation collaterally. Plaintiff sues as a corporation *de facto*, and whether or no it be a corporation *de jure* cannot be inquired into by the defendants. The second cause alleged for demurrer is that there have been improperly united two causes of action to enforce liens for two assessments made on the same land at different times. This is the ground upon which the Court below sustained the demurrer, and was the only ground seriously urged on the argument. It cannot be said, that these two assessments are separate transactions; they are rather one single transaction, portions of which arise prior to the rest.

W. L. Dudley and Byers & Elliott, for Respondents.

Two assessments cannot be united in one action. (*Dyer v. Barstow*, 50 Cal. 652.) The Board of Supervisors had no jurisdiction to assess for work done before any plans were submitted. It does not appear that the petition set forth facts sufficient to give the Supervisors jurisdiction to form a Swamp Land District. Nor does it appear that the petition was recorded by the County Recorder, or that the Register ever received a certified copy of the petition, or that the Register forwarded a statement to the Treasurer. (P. C. §§ 3446, 3449, 3450 and 3451.)

SHARPSTEIN, J.:

The complaint in this action is entitled, "In the District Court," etc., "Swamp and Overflowed Land Reclamation District, No. 110, of the State of California, in and for San

Joaquin County, plaintiff, v. Christian Feck, the Stockton Building and Loan Association, John Doe and Richard Roe, defendants."

The first statement in the complaint is that "the plaintiff, a corporation duly formed, organized and created under and by virtue of the law of the State of California, * * * for cause of action alleges." This statement is followed by a statement of the cause of action. The defendants demurred to the complaint. The first ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action. The objections specified are in substance that it does not appear from the complaint that the plaintiff was ever duly created a swamp and overflowed land district. That objection, however, if well taken, would go to the legal capacity of the plaintiff to sue, and not to the sufficiency of the facts stated to constitute a cause of action. (*The Phoenix Bank v. Donnell*, 40 N. Y. 410.) A demurrer on the ground that the plaintiff has not the legal capacity to sue, would be bad, because it does not appear upon the face of the complaint that the plaintiff has not. It is not a good ground of demurrer that it does not appear in the complaint that the plaintiff has the legal capacity to sue. That omission can only be taken advantage of by answer. (C. C. P. § 432; *The Phoenix Bank v. Donnell*, *supra*.)

Another ground of demurrer specified is, that several causes of action have been improperly united, to wit: Two causes of action to enforce liens for two assessments made on the same land at different times. The first assessment was based upon an estimate of the probable expense of the work which it had been resolved to do. The amount of money raised by that assessment was exhausted before the completion of the work. Another estimate of the amount required to complete the work was made, and a supplemental assessment, for which the law provides, was made to cover the expense of completing the work. If there be any reason why these two assessments cannot be recovered in the same action, it has not been brought to our attention. And unless there be some substantial reason for not uniting them in one action, they should be so united, in order to avoid a multiplicity of actions. *Dyer v. Barstow*, 50 Cal. 652, is not a parallel case.

But the complaint shows that some part of the assessments is for work done before the Board of Trustees was elected, and consequently before any engineers could have been employed "to survey, plan, locate and estimate the cost of the work necessary for reclamation," etc.

We do not think that the Board of Trustees or its engineer had any authority to estimate the value or cost of work which had been done before the Board had any existence. It was the cost of the work necessary to be afterwards done for reclamation that the engineer was to estimate and the Board of Trustees to report to the Board of Supervisors. Work which had been previously done should not have been included in an estimate of the cost of work which it was necessary to do for reclamation. And if not it is quite clear that the Commissioners were not authorized to assess upon the lands situated within the district a charge for work done before any Board of Trustees had been appointed.

It is true that there was a by-law adopted which provided for such an assessment, but the Code as we read it does not leave this matter to be regulated by a by-law, and the one relied upon is inconsistent, we think, with the provisions of the Code upon the same subject.

Judgment affirmed.

MCKINSTRY, THORNTON, MCKEE, and ROSS, JJ. concurred.

[No. 6,632.—Department One.]

April 10, 1882.

FANNY WHITE v. MATTHEW NUNAN ET AL.

INJUNCTION—DISCRETION—APPEAL.—The continuance or dissolution of an injunction to prevent a sale of property, pending an action between the parties to determine the right to the property, is a matter within the sound discretion of the Court that issues the injunction, and this Court will not interfere with the exercise of that discretion, except in a case of palpable error or abuse of discretion.

APPEAL from an order refusing defendants' motion to dissolve injunction in the Fifteenth District Court of the City and County of San Francisco. DWINELLE J.

1. *Huller v. Collins*, 63 Cal. 258.

The legal title to the land in controversy was in the plaintiff. It was claimed by the defendants that the execution debtor was the equitable owner.

No brief on file for Appellant.

McAllister & Bergin, for Respondent.

That the continuance or dissolution of an injunction in such a case as the present is a matter of discretion which this Court will not revise, is so well settled as not to admit of argument. (*Patterson v. Board of Supervisors*, 50 Cal. 345; *De Godey v. Godey*, 39 id. 167; *McCreery v. Brown*, 42 id. 462.)

McKEE, J.:

On March 5, 1878, defendant, N. Proctor Smith, having recovered judgment against one John Miller for ten thousand five hundred and eighty-four dollars and costs, caused an execution to be issued thereon, and placed in the hands of his co-defendant, who, then being Sheriff of the City and County of San Francisco, levied the same upon the premises in controversy, and advertised them for sale according to law, to satisfy the execution. The plaintiff, claiming to be the owner in fee of the premises as her separate estate, commenced the action, out of which this case arises, to enjoin the sale as a cloud upon her title. On filing the complaint, the Court below awarded her an injunction enjoining the sale. The defendants answered the complaint, and, on the coming in of the answer, moved to dissolve the injunction. The motion was denied, and from the order of denial the defendants appeal.

The continuance or dissolution of an injunction to prevent a sale of property, pending an action between the parties to determine the right to the property, is a matter within the sound discretion of the Court that issues the injunction; and this Court will not interfere with the exercise of that discretion, except in a case of palpable error or abuse of discretion. (*De Godey v. Godey*, 39 Cal. 167; *McCreery v. Brown*, 42 id. 462; *Patterson v. Board of Supervisors*, 50 id. 345; *Efford v. S. P. R. R. Co.*, 52 id. 277; *Coolot v. C. P. R. R. Co.*, 52 id.

65; *Payne v. McKinley*, 54 id. 532; *Parrott v. Floyd*, 54 id. 534.) In the case in hand there appears to be no such error or abuse of discretion, and the order is affirmed.

ROSS and MCKINSTRY, JJ., concurred.

[No. 7,514.—In Bank.]

April 13, 1882.

THE LOWER KINGS RIVER WATER DITCH CO. v. THE KINGS RIVER AND FRESNO CANAL CO.

PLACE OF TRIAL—ACTION FOR DIVERSION OF WATER—APPEAL FROM ORDER REFUSING TO CHANGE THE PLACE OF TRIAL.—Appeal from order denying defendant's motion for change of place of trial. The action was for the diversion of water from the plaintiff's ditch, and was commenced in Tulare County. The defendant's principal and only place of business was in Fresno County. The plaintiff's ditch is situated partly in Fresno and partly in Tulare County—the head of the ditch and the point of diversion of the water by the defendant being in the former county.

Held: The order denying the motion was correct. The right of the plaintiff, as stated in the complaint, to have the water flow in the river to the head of its ditch is an incorporeal hereditament appurtenant to the ditch, and is co-extensive with plaintiff's right to the ditch itself. The subject of the action is, therefore, situated in both counties and the action might have been brought in either. The injury is not confined to that part of the ditch in Fresno County.

APPEAL from an order denying defendants' motion to change place of trial in the Superior Court of Tulare County.
CROSS, J.

H. S. Dixon, for Appellant.

The action was not "properly brought in Tulare County," and is not "to recover damages for an injury to ditch property and the water-right belonging thereto," and for an injunction. I venture to assert that no Court has ever heard of "ditch property." Counsel coin this definition. Unless it is meaningless it is absurd. An unlettered man might loosely refer to his "ditch property," but lawyers must know that all property is classified and must be either real or not real. This, counsel claims, is complaint for "injury to real property,"—or as they term it, "ditch property."

I confidently submit that such is not the case, and that the

action is purely one *in personam* for damages for trespass upon an incorporeal hereditament, to wit: the right to divert the water of the stream in question, and, as an incidental thereto, for an injunction, and hence is a transitory action.

Brown & Daggett and J. Jacob, Jr., for Respondent.

We contend that the action was properly brought in Tulare County, and should be tried therein, notwithstanding defendant is a resident of Fresno County. The action is brought to recover damages for an injury to the ditch property and water right belonging thereto, which said ditch, property, and water right belong to this plaintiff. A water ditch and the water right appurtenant thereto are real property. (C. C. §§ 658, 659, 662; *Farmer v. Ukiah Water Co.*, 56 Cal. 13; *Reed v. Spicer*, 27 Id. 58; C. C. § 1104; 3 Washburn, Real Prop., 4th Ed., marginal page 627; *Hill v. Newman*, 5 Cal. 445; C. C. P. § 392.)

MYRICK, J.:

This is an appeal from an order denying defendant's motion for change of venue. The motion was based on the ground that the action was not brought in the proper county, and was resisted on the ground that the action was brought in the proper county, and that it should be retained for the convenience of witnesses. The action was commenced in Tulare County, and the defendant, a corporation, has its principal and only place of business in Fresno County.

The plaintiff in its complaint alleges that it is and has been ever since October, 1873, the owner of a certain ditch used in conveying water from King's River and selling the same for agricultural purposes, and of the right to divert and carry water through the same; and that in 1875 defendant constructed a ditch above the mouth of plaintiff's ditch and diverted from said river nearly all the water flowing therein, to the damage of plaintiff and of its water right.

It appears from the affidavits in the case that the points of diversion of the water from the river by both plaintiff and defendant are in Fresno County, and that plaintiff's ditch is about twenty miles in length, about eighteen miles thereof being in Tulare County, the remainder in Fresno County, and

that the damage sustained by plaintiff by reason of the acts of defendant has been sustained by plaintiff and committed by defendant upon property wholly within Tulare County.

The Court below denied the motion; but upon what ground the denial was based, does not appear. We think the order denying the motion was correct, upon the ground that the action was properly brought in Tulare County. (C. C. P., 392.) Watercourses are either natural or artificial. Plaintiff's ditch was an artificial watercourse. "A watercourse consists of bed, banks and water." (Angell on Watercourses, Sec. 4.) The right of plaintiff, as stated in its complaint, to have the water flow in the river to the head of its ditch, is an incorporeal hereditament, appertaining to its watercourse. Granting that plaintiff does not own the *corpus* of the water until it shall enter its ditch, yet the right to have it flow into the ditch appertains to the ditch. Real property consists of land, that which is affixed to land, and that which is incidental or appurtenant to land. (Civil Code, 658.) If the watercourse, consisting of the bed and banks of the trench, and of the water therein, be real property, the right to have water flow to it is incidental and appurtenant thereto.

The acts complained of are preventing water from flowing in plaintiff's ditch; the ditch is located in both counties; therefore the subject of the action is in both counties, and the action might have been brought in either. It is true that the specific act complained of, viz: the diverting of the water, occurred in Fresno county, at the head of defendant's ditch, and not at all upon plaintiff's ditch; but the consequences of that act operated upon the whole of plaintiff's ditch, and was injurious as well to that part of it in Tulare County as to that in Fresno County. In no sense can the injury be said to be confined to that part of the ditch in Fresno County. The ditch is an entirety, and the right to have water flow in it is co-extensive with plaintiff's right to the ditch itself. Such is the case as now presented to us.

Upon the other point, viz: retaining the case for convenience of witnesses, we express no opinion.

Order affirmed.

MORRISON, C. J., and THORNTON, SHARPSTEIN, MCKEE, and MCKINSTRY, JJ., concurred.

[No. 8,330.—Department Two.]

April 20, 1882.

W. E. VAN SLYKE ET AL v. WILLIAM H. MILLER ET AL.

DAMAGES FOR FRIVOLOUS APPEAL.

APPEAL by the defendant Miller from a judgment for the plaintiffs in the Superior Court of San Bernardino county. ROLFE, J.

The complaint was in the ordinary form to foreclose a mechanic's lien, and alleged that the sum of one hundred dollars was a reasonable attorney's fee. The answer admitted all the allegations of the complaint except the allegation as to attorney's fee, and for further defense alleged that after the commencement of the action the defendant tendered to one of the plaintiffs the amount due on the lien, and the further sum of ten dollars for the accrued costs in the action, and that the said Taylor, for the said firm, accepted the said sum in full of the amount due on the lien and for accrued costs. The Court found the payment of the sum alleged, but that such payment was not made nor accepted as payment in full of said demand and costs, nor in full satisfaction thereof; and also found that fifty dollars was a reasonable attorney's fee and rendered judgment accordingly.

Boyer & Gibson, for Appellants.

Paris & Goodcell, for Respondents.

The COURT:

No briefs on file—no error appearing—and it appearing to the Court that the appeal was taken for delay, the judgment is affirmed with fifty per cent damages.

[No. 8,811.—Department Two.]

April 21, 1882.

WM. H. BROADRIBB, AN INSANE PERSON, BY H. GOODCELL, JR., HIS GUARDIAN, v. LUTHER C. TIBBETS ET AL.

APPEALABLE ORDER.—An order denying defendant's motion for judgment by default on his cross-complaint is not appealable.

APPEAL from an order of the Superior Court of San Bernardino Co. ROLFE, J.

Luther C. Tibbets (in person), for Appellant.

A. B. Paris and *R. E. Bledsoe*, for Respondent.

The COURT:

The appeal in this case is "from the order of said Court (the Superior Court of San Bernardino county) denying defendant's motion for judgment by default against H. Goodcell, Jr., guardian of William Broadribb, insane, for the sum of one hundred and thirty-seven dollars and forty-four cents, and that said Goodcell be removed from the position of guardian as prayed in defendant's cross-complaint."

Section 963, C. C. P., enumerates the cases in which an appeal may be taken from a Superior Court to the Supreme Court, and the order above specified is not embraced in said enumeration.

Appeal dismissed.

[No. 10,689.—In Bank.]

April 29, 1882.

THE PEOPLE v. EDWARD McLANE.

CREDIBILITY OF WITNESS—CONVICT—INSTRUCTION.—The Court below did not err in refusing to instruct the jury, that, "A witness who has been convicted of the crime of burglary, and served out a term of imprisonment for such crime, is not entitled as a witness to full credit at your hands."

APPEAL from a judgment of conviction and from an order denying a new trial in the Superior Court of the City and County of San Francisco. FERRAL, J.

George W. Tyler, for Appellant.

A. L. Hart, Attorney General, for Respondent.

The COURT:

The Court below did not err in refusing to instruct the jury, that, "A witness who has been convicted of the crime of burglary and served out a term of imprisonment for such crime is not entitled as a witness to full credit at your hands." Every person (with certain exceptions, of whom a convict is not one) who, "having organs of sense, can perceive," etc., is a competent witness. (C. C. P., 1879.) Every competent witness is presumed to speak the truth. Whether the presumption is removed by evidence, is a matter of which the jury are the "exclusive judges." (C. C. P., 1847.) A witness may be impeached, that is to say, the credibility to which his testimony is presumptively entitled may be removed (hindered or barred) by testimony or evidence contradictory of or rendering incredible his statements, or by evidence of general bad reputation for veracity, etc. (C. C. P., 2051, 2052.) But it remains for the jury to determine whether a particular witness has told the truth in the case, notwithstanding the fact is established of his general bad reputation for truth and integrity. So they may believe a witness, notwithstanding proof of his conviction of a felony.

It would have been error to have charged the jury that a former conviction, necessarily, and as a matter of law, deprived the particular witness of any portion of the credit presumptively due to the testimony of witnesses.

Judgment and order affirmed.

[No. 7,450—In Bank.]

April 29, 1882.

LLEWELLYN KIDDER v. IRA STEVENS.

EJECTMENT—PLEADING—FINDING—SEISIN—OUSTER—TIME.—In ejectment the complaint averred seisin in fee on the first day of June, 1879, and an ouster on the same day; and it was found by the Court that the plaintiff was owner in fee of the land in controversy, on the twenty-ninth of June, 1868, and conveyed the same to M. K. on the sixteenth of November, 1875; that M. K. died testate in May, 1879; that his executor leased to the defendant in August of the same year, and that defendant had continued to occupy the premises ever since. It was objected that there was no finding on the issue of ownership on the first day of June, 1879, the date of the seisin alleged in the complaint. *Held:* The findings cover all the material issues.

ID.—ID.—ID.—ID.—ID.—ID.—PRESUMPTION OF LAW.—A presumption of law that is disputable when not changed by evidence becomes to the Court a rule indisputable for the case, and the Court is bound to apply it.

ID.—ID.—ID.—ID.—ID.—ID.—A status once established is presumed by the law to remain until the contrary appears.

ID.—ID.—ID.—ID.—ID.—ID.—IMMATERIAL ALLEGATION.—The allegation of time as to seisin or ouster in our so called action of ejectment, is not material, and a denial of it raises no material issue except when the mesne profits are in question.

DEED—MENTAL INCOMPETENCY.—The Court found that on the sixteenth day of November, 1875, and before and after that date, L. K. was of unsound mind—his mental unsoundness consisting of a fixed insane delusion in regard to religion, to wit: that he had incurred the displeasure of God, and could only expiate his sins by refraining from partaking of food; that he also during said time had occasional paroxysms of *melancholia*; that on that day he signed, acknowledged and delivered to M. K. (his wife) a deed of gift of the premises in controversy; that said L. K. at the time he made and delivered the deed, understood the nature, force and effect of the act, and that said act was not the result of his insane delusion.

Held, that the finding was sustained by the evidence, and that the deed was valid.

ID.—DELIVERY—CONFLICT OF EVIDENCE.—The fact that the deed was found among the papers of the grantee after her death is some evidence at least that it had been delivered to and accepted by her; and evidence tending to prove non-delivery would simply raise a conflict in the testimony.

ID.—ADMISSIBILITY OF EVIDENCE.—The Court did not err in admitting the evidence of Houghton (stated below). It tended to prove a motive for the making of the deed, and was admissible under the issues being tried.

ID.—ID.—No question concerning the will of M. K. was involved in this case, and it was not error to exclude evidence as to its existence or destruction.

ID.—ID.—DELIVERY—RES GESTÆ.—Evidence of the acts and declarations of

the grantee in regard to the deed while it was in her actual possession were admissible upon the question of her acceptance of it.

Id.—Id.—HEARSAY—INSANITY.—It was not error to exclude evidence of the declarations of M. K. as to what was done or said by her husband some time after the execution of the deed.

APPEAL from a judgment for the defendant and from an order denying a new trial in the Superior Court of the County of Santa Clara. SPENCER, J.

The following is the statement of Houghton referred to in the opinion.

Mr. Houghton, of counsel for defendant, here made a statement in reference to the ranch on the Coyote, alluded to in the testimony as follows, which plaintiff's counsel agreed to but objected that it was irrelevant:

"The property on the Coyote was deeded to S. J. Hensley as trustee for Mary Kidder, a number of years ago by her brother by way of gift—he claiming under what is known as the five hundred acre lot title from the City of San Jose, the land being a part of the Pueblo lands of the City of San Jose. The five hundred acre lot title proved not valid, but Mrs. Kidder was living upon the property when Kidder married her, Hensley procured a valid deed from the City of San Jose, subsequently to himself, for the same property. Stowell, the brother of Mrs. Kidder, died, and Russell Stevens, her son, was appointed administrator of his estate. After the administration was ended and the estate was closed up, Kidder came into the family, and when Hensley was attempting to eject Mrs. Kidder (formerly Mrs. Stevens) and opened up the estate of Stowell, and as a representative of the estate of Stowell, if I remember correctly, brought an action against Hensley to have him declared a trustee and to compel a conveyance of the property. This action was compromised, and the deed to Mrs. Kidder was the result.

Burt & Pfister, for Appellant.

The findings are clearly insufficient to sustain the judgment. The ultimate fact of ownership is not found for defendant and the probative facts found by the Court do not bring about, as a necessary deduction therefrom, ownership against plaintiff in defendant or any other person. These

probative facts may all be true and yet plaintiff may have been at the commencement of his action the owner of the property. (*Knight v. Roche*, 56 Cal. 15.)

In view of all the acts and declarations by Mrs. Kidder after the purported execution of the deed, especially her declarations in conversation with Mr. Bazell, wherein she specified the very reason why she did not accept the deed, no such idea as that of an actual acceptance of the deed can be entertained for a moment. The error of law into which the learned judge fell, the Court will see to be this: He took the mere fact that the deed was a gift-deed and clearly for the benefit of the grantee, to raise a presumption of an acceptance by the grantee as a rule of law. If there is any presumption at all from the fact that the deed is a gift-deed, and therefore clearly for the benefit of the grantee, it is only a presumption of evidence and not a rule of law. (*Fitch v. Bunch*, 30 Cal. 212; *Dow v. Gould & C. S. M. Co.*, 31 Id. 652; *Gilbert v. Sanderson* [Sup. Ct. Iowa]; Washburn's Real Prop. [3 ed.], Vol. 3, 254, 255, 261, 262.)

The admissions of Mary Kidder during her life as to the mental condition of plaintiff, both before and after the purported execution of the deed, were admissible for the purpose of showing the mental condition of plaintiff at the time of such purported execution, and the Court erred in excluding the admissions of Mary Kidder as to conduct of plaintiff after such purported execution.

The Court erred in admitting the declaration testified to by Jessie Kidder. (Washburn's Real Prop., 3d. ed. 262; Whar. Ev. 5, 265, 1180.)

The Court erred in admitting the statement of Mr. Houghton, it being irrelevant, immaterial and incompetent.

S. A. Barker, and Houghton & Reynolds, for Respondent.

It is well settled, that where a deed is found in the grantee's hands, a delivery and acceptance is always presumed. (3 Washburn on Real Prop. 263, 3d. ed.) And also, that where the grant is a pure, unqualified gift, the presumption of acceptance can only be rebutted by proof of dissent. (Id. 264-5.) The statement of Mr. Houghton, counsel of defendant, was relevant.

S. F. Leib, Amicus Curiae.

The plaintiff there, finds himself in this helpless dilemma. The findings are correct. So he has no remedy by attacking the findings by motion for a new trial. There are no presumed findings; so he can not attack a presumed finding of title in defendant at the time of commencement of action. The plaintiff, then, while being full owner, both now and when he commenced the action, is yet, by this new departure in our practice, to lose his land. This, we submit, is both unjust and illogical, as well as contrary to our previous decisions. (*Matthews v. Kinsell*, 41 Cal. 514; *Marshall v. Shafter*, 32 id. 193; *Pico v. Cuyas*, 47 id. 177-8; *Barrente v. Garratt*, 50 id. 114; *Smith v. Acker*, 52 id. 219; *Frazier v. Crowell*, id. 402.)

THORNTON, J.:

The findings in this case are as follows: "1. On the twenty-ninth day of June, 1868, Barton B. Bee was the owner in fee of the premises described in the complaint, and on said day sold and conveyed the same to the plaintiff, L. Kidder; that said premises were the separate property of said L. Kidder.

"2. That on and prior to the sixteenth day of November, 1875, and from thence until the seventh day of May, 1879, said L. Kidder and Mary Kidder were husband and wife, and on the last-named date said Mary Kidder died testate.

"3. That prior to and on said sixteenth day of November, 1875, and for a long time thereafter said Llewellyn Kidder was of unsound mind; that his mental unsoundness consisted of a fixed insane delusion in regard to religion, to wit; That he had incurred the displeasure of God and that he could only expiate his sins by refraining from partaking of food. He also, during such time, had occasional paroxysms of *melancholia*.

"4. That on the sixteenth day of November, 1875, said Llewellyn Kidder signed, acknowledged, and delivered to said Mary Kidder a written deed of conveyance in proper form by way of gift to her of the said premises described in the complaint, and said Mary Kidder accepted said instrument.

"5. That said Llewellyn Kidder at the time he made and delivered said deed understood the nature, force and ef-

fect of said act, and that said act was not the result of his said insane delusion.

"6. That said Mary Kidder was at the time of her death a resident of the county of Santa Clara, State of California. That in her last will she nominated and appointed Joseph C. Brown the executor thereof. That said will was proved in and admitted to probate by the Probate Court of said county of Santa Clara, on the nineteenth day of July, A. D. 1879, and letters testamentary were issued upon said will and the probate thereof by said Probate Court to said Brown, who duly qualified as such executor on the twenty-sixth day of July, 1879, and has been ever since the acting executor of said will.

"7. On the first day of August, 1879, said Brown as said executor demised and let said premises to the defendant Ira Stevens, who then entered into the possession and occupation thereof as the tenant of the estate of said Mary Kidder, deceased, and has ever since occupied the same.

"8. That the value of the use and occupation of said premises on the first day of August, 1879, was, and ever since has been, twelve dollars per month.

"9. That said James Singleton was, on and prior to the first day of August, 1879, the properly appointed and acting guardian of the person and estate of said Llewellyn Kidder under and by virtue of proper orders of the Probate Court of the said county of Santa Clara, and letters of guardianship properly issued pursuant to said order to him, said Singleton, and he, said Singleton, has ever since continued to be said legally acting guardian.

"10. That shortly after the first day of August, 1879, said Singleton, as said guardian, demanded the possession of said premises for his ward from said defendant, and said Stevens then refused and ever since has refused to surrender the possession thereof."

An objection is taken to the findings of fact which involves a singular misconception of their meaning. It is found that L. Kidder, on the sixteenth day of November, 1875, conveyed the land in controversy to his wife, Mary Kidder, and that on the seventh day of May, 1879, Mary Kidder died testate, that her will was on the nineteenth of July, 1879, properly proved,

and one Brown named in the will as executor was duly appointed executor and acted as such, and on the first day of August, 1879, as such executor, demised the premises to one Ira Stevens, the defendant, who has ever since occupied the same. The other findings cover all the other issues in the action which were material.

Now it is said, that in the complaint ownership was alleged in the plaintiff and an ouster on a day named—which was denied, that the Court made no finding on that issue, but made a finding which it took to be a finding of ownership in the party under whom the defendant claims at a date several years prior to the date named in the allegation.

The complaint avers a seisin in fee on the first day of June, 1879, and an ouster on the same day. It is found that the plaintiff was the owner in fee on the twenty-ninth of June, 1868, and conveyed to Mary Kidder, on the sixteenth day of November, 1875. And it is said this is not a finding on the issue of ownership on the first day of June, 1879, when the seisin was averred to have been had in the complaint. Why it is not such a finding it would be difficult to point out when the rules of law are applied to the facts as found. We must read all facts, whether in a pleading, or a special verdict, or an agreed statement, or finding of facts, in the light of the rules of law. Presumptions of law are rules of law, whether disputable or the contrary. If the disputable presumption is not contradicted or removed by evidence, it is a rule of law to be applied as inflexibly as a presumption that is indisputable or conclusive; in other words, a presumption of law that is disputable, when not changed by evidence, becomes to the Court a rule indisputable for the case, and the Court is bound to apply it.

A *status* once established is presumed by the law to remain, until the contrary appears (See *People v. Feilen*, 58 Cal. 218); or as a like rule is expressed, in the Code of Civil Procedure (See Section 1,963, subdivision 32), "that a thing once proved to exist continues as long as is usual with things of that nature."

It is found here that a conveyance of the premises was made in 1875 by plaintiff, the owner, to Mary Kidder. The law presumes that the estate created by that deed continued

until it was proven to have ceased, in the only way in which it can cease, by a conveyance or by a descent cast. It is further found that Mary Kidder died testate, in May, 1879; the executor was properly appointed in same year, leased to defendant in August, 1879, and that defendant had continued to occupy the premises ever since. Now, the estate of Mary Kidder having been found to have commenced in November, 1875, the law says that her estate continues until the proof shows that it had gone out of her; it then continued until her death, and by her will her executor under the law had the right to demise it to the defendant.

The vice of the view taken by the learned counsel for appellant is this, that he takes that for an inference, or, as he calls it, "a presumption from evidence," which is in fact a *pure presumption of law*. Though a disputable presumption, it is still a rule of law. (So held in *Salmon v. Symonds*, 24 Cal. 264.)

But, in fact, the allegation of time as to seisin or ouster in our so called action of ejectment is not material, and a denial of it raises no material issue, except when the *mesne* profits are in question. (So held distinctly in *Yount v. Howell*, 14 Cal. 468.) If no material issue is raised by a denial of the time alleged, it is unnecessary to find upon it. It is stated in all the elementary books that time is immaterial as to seisin or ouster in the common law action of ejectment, and in all real actions. It is only required that the seisin or ouster should be alleged to exist before the commencement of the action, but the *day or date* is otherwise entirely immaterial. (See Gould's Plead., §§ 63, 101 of Ch. 3; 1 Chitty's Pl. 257 *et seq.*, 9th Am. Ed.; Stephen on Plead. 292 *et seq.*, 9th Am. Ed.; *Taylor v. Wells*, 2 Saunder's Rep., 74 note c.; Com. Dig. Pleading, (c. 19); *King v. Bishop of Chester*, 2 Salk, 561; S. C., Skinner, 660.)

But it is said that the plaintiff with such a finding is without remedy. The point in this regard is thus stated: "He could not attack the finding of ownership in B. on the tenth of January, 1850, (averred to have been the tenth of January, 1880), for that finding would speak the truth. There would be nothing left for him to attack, on his motion for a new trial, but a disputable presumption of evidence, which he had

already met and rebutted on the trial of the case, and he would find himself fighting the air with his hands, with no hope of relief from the position occupied by him without any fault of his own."

If what the learned counsel states be a "disputable presumption of evidence," is such, there can be no difficulty in his remedy. If the evidence sustains the so-called presumption, there is nothing to attack. If it does not, a motion for a new trial is the proper remedy. The counsel seems to think that inasmuch as he had met and rebutted this presumption on the trial, it would be idle to attack it again, in the mode pointed by law for such an attack. It is sufficient to say in answer to this that the Court did not agree with him that such presumption was met or rebutted on the trial, but found against him; and when the Court so finds, to review such finding on the ground that such presumption was met and rebutted on the trial, that is to say, that the evidence was insufficient to support the fact as found, there must be a motion for a new trial, or the party must bring it before this Court in accordance with Section 939, C. C. P.

The findings in our judgment cover all the material issues. The opinion in the Department is satisfactory on the points to which it relates, and we conclude that the judgment and order should be affirmed, and it is so ordered.

MCKEE and SHARPSTEIN, JJ., concurred.

MORRISON, C. J., concurred in the judgment.

MCKINSTRY, J., concurring:

I concur in the judgment. It has been repeatedly held here that ownership—seisin in law—is to be treated as a *fact* both in pleadings and in findings. The seisin of plaintiff at the commencement of the action and the possession of the defendant at the commencement of the action are, under our system, the material facts to be alleged and proved by plaintiff in the class of actions which, for the want of a better name is called "ejectment." As said by Mason, J., in *Walter v. Lockwood*, 23 Barb. 233, "the facts constituting plaintiff's cause of action in this case are that he has lawful title

as owner in fee simple, and that the defendant is in the possession and unlawfully withholds the possession thereof from him." "Now, what is the issue? The plaintiff alleges that he has lawful title, as owner in fee simple, to these premises. This is denied by the answer, and a perfect issue is made upon the plaintiff's title," etc. And by Field, C. J., in *Payne v. Treadwell*, 16 Cal. 243: "Now what facts must be proved to recover in ejectment? These only: That the plaintiff is seised of the premises, or of some estate therein in fee, or for life, or for years, and that the defendant was in their possession at the commencement of the action. The *seisin* is the *fact* to be alleged. It is a pleadable and issuable fact, *to be established* by conveyances from a paramount source of title, or by evidence of prior possession," etc. (See also *People v. Mayor, etc.*, 28 Barb. 240: 8 Abb. Pr. 7; S. C., 17 How. Pr. 56; *Walter v. Lockwood*, 4 Abb. Pr. 307.) The plaintiff recovers because defendant is actually possessed of that which the plaintiff has the right to possess when he goes to Court for redress.

Aside from the question of ouster by the defendant, the material question is: Was plaintiff seised of an estate which gave him the right to immediate possession when he brought his suit? He may prove his right by evidence of facts—as a conveyance from the source of title, or a prior possession—of a date anterior to the commencement of the action. In such case, the seisin of the plaintiff is presumed to have continued until suit brought. But such presumption has no place in the construction of his pleading, which should aver the ultimate and material fact.

In the case before us the Court below found that on a certain day one Bee was the owner of the demanded premises, who sold and conveyed the same to plaintiff, and that, subsequently, on a day four years prior to the commencement of the action, plaintiff conveyed to one Mary Kidder, under whom defendant claims.

Appellant urges that the findings do not pass upon the ultimate issue—plaintiff's ownership and consequent right to the possession—at the time of the commencement of the action. Had the complaint alleged that plaintiff was seised in fee when the suit was brought, appellant's point would

have been well taken. The findings do not show but plaintiff re-acquired the right to the possession intermediate his conveyance to Mary Kidder and the commencement of the action. There is no finding that either plaintiff or defendant is or was at the commencement of the action the owner seised in fee or of a less estate, or otherwise entitled to the possession of the demanded premises.

But the complaint here only alleges that, on the first day of June, 1879, "the plaintiff was the owner, seised in fee," etc., and that while the plaintiff was so the owner, etc., "the defendant did, on or about the said first day of June" enter into and oust plaintiff from the premises, "and ever since that day has wrongfully withheld," etc. The precise date of the *ouster* is immaterial, but the plaintiff must prove it to have occurred prior to the commencement of the action. This action was commenced November 29, 1879. There is no averment that plaintiff *is* seised, in fee or otherwise. The allegation of a *wrongful* withholding is of a conclusion of law, which can follow only where facts are alleged which show plaintiff to be entitled to the possession when the suit is brought. If the Court below, adopting the language of the complaint, had found "on the first day of June, 1879, the plaintiff was the owner seised in fee," etc., such finding would not have been determinative of the issue which is one of the two material issues in this form of action. Then it might have been said: "*Non constat* but plaintiff parted with his title before he commenced his action."

The objection of plaintiff is that the Court below failed to find upon the ultimate issue—was plaintiff the owner and entitled to the possession of the demanded premises when he brought his action? Such a finding, however, would have been broader than the issue, since the averment of the complaint is not that plaintiff *is* the owner (or was at the commencement of the action), but that he was seised in fee at a definite point of time long previous to the commencement of the action.

MYRICK, J., concurred.

The following is the opinion of Department Two, referred to:

SHARPSTEIN, J.:

If there is evidence sufficient to justify the findings that Llewellyn Kidder executed a conveyance of the demanded premises to Mary, his wife, and that she accepted said conveyance; and that at the time of the execution and delivery thereof said Llewellyn Kidder understood the nature, force and effect of said act, and that said act was not the result of his insane delusion, the judgment of the Court below must be affirmed. The fact that the deed was found among the papers of the grantee after her death is some evidence, at least, that it had been delivered to and accepted by her. So that evidence which only tended to prove that it had not been delivered to or accepted by her, would simply raise a conflict in the testimony. But there was evidence independently of the fact of possession which tended to prove that she did accept the deed.

As to the mental condition of the grantor at the time he executed the deed, there is clearly a conflict in the evidence, and we think that the Court was justified in finding as it did upon that issue.

We do not think that the Court erred in overruling the objection to the testimony of Mr. Houghton. It tended to prove a motive for the making of the deed, and was admissible under the issues being tried.

No question concerning the will of Mrs. Kidder was involved in this case, and it was not error to exclude evidence as to its existence or destruction.

We do not think that the Court erred in admitting the testimony of the witness Jesse Kidder as to what Mrs. Mary Kidder said concerning the deed when she had it in her hands, in the presence of the witness. Upon the question of acceptance it might have an important bearing. We can not conceive why evidence of the acts and declarations of the grantee in regard to the deed while it was in her actual possession would not be admissible upon the question of her acceptance of it; or why evidence of the declaration as well as of the acts were not admissible.

We are unable to discover any principle upon which evidence of the declarations of Mary Kidder as to what was

done or said by her husband some time after the execution of the deed was admissible. Upon the question of his sanity at the time of the execution of the deed evidence of what he said and did afterwards was admissible. But we know of no rule by which a witness could be allowed to testify to what somebody else said about the acts or conduct of the person alleged to have been insane. Suppose that it could have been shown that Mrs. Kidder communicated to some one that at some time after the execution of the deed her husband acted like an insane person, could it have any bearing upon the issue of sanity unless it tended to prove that he was either sane or insane? And for the purpose of proving that he was or was not, it was clearly inadmissible. It is sometimes important to prove that a certain declaration was made without regard to its truth or falsity. But that is not this case. Here it was only important to show what were the acts and conduct of the person alleged to have been insane. It was not in any sense important to show what Mrs. Kidder, who had not been and could not be called as a witness, had said they were.

Judgment affirmed.

MORRISON, C. J., and SHARPSTEIN and THORNTON, JJ., concurred.

[No. 8,390.—Department Two.]

May 9, 1882.

FARMER SANBORN v. SUPERIOR COURT OF CONTRA COSTA COUNTY.

JURISDICTION OF JUSTICE'S COURT AND OF SUPREME COURT ON APPEAL—

ACTION FOR THE CONVERSION OF PERSONAL PROPERTY—CONSTITUTIONAL LAW.—In an action in a Justice's Court for the conversion of personal property the complaint alleged the property to be of the value of two hundred and fifty dollars, and that plaintiff had sustained damages in the further amount of fifty dollars; and demanded judgment for two hundred and ninety-nine dollars and costs. Judgment was entered accordingly, and the defendant, after having appealed to the Superior Court, applied to this Court for a writ of prohibition.

Held: The Justice's Court had jurisdiction were it otherwise, and the Superior Court would have jurisdiction of the appeal.

APPLICATION for a writ of prohibition to the Superior Court of Contra Costa County.

G. W. Laughn, for Plaintiff.

No appearance for Defendant.

THORNTON, J.:

This is an application for a writ of prohibition made on the following state of facts: On the twelfth of September, 1881, J. Cottrell commenced an action against the petitioner, Farmer Sanborn, in a Justice's Court of Contra Costa County to recover damages for the conversion of personal property. The property is alleged in the complaint to be of the value of two hundred and fifty dollars, and the further allegation is made that the plaintiff has sustained damages to the amount of fifty dollars. The applicant states further in his petition as follows: "And without waiving any part of the amount so claimed, the plaintiff prayed judgment for the sum of two hundred and ninety-nine dollars damages and for costs." In this action defendant demurred and objected to the jurisdiction of the Court. The demurrer was overruled, and the Court on a trial subsequently had rendered judgment for plaintiff for two hundred and ninety-nine dollars damages and for costs. The petitioner then appealed to the above mentioned Superior Court on both questions of law and fact. In this Court the same objection was made by petitioner, which was overruled, and the cause was afterwards set down for trial. The application is here made to restrain the Superior Court from proceeding to try the cause or to take any steps in it.

The application is novel and singular. The party appealing asks that a Court shall be restrained from trying the appeal which he prosecutes. The novel status is presented of a party invoking by his own act the jurisdiction of a Court, and then denying it and asking that it be restrained from exercising it. Such contradictory positions with reference to the same matter, sometimes called "blowing hot and cold," do not commend petitioner's application. (See Broom's *Leg. Maxims* '69.) It seems to us that the appellee would have a right to

have the appeal determined and final judgment entered either for or against him. But waiving this, we see nothing in the objection. It seems to us clear that the Justice's Court had jurisdiction; and if it did not, the Superior Court certainly had to determine the appeal. If the judgment of the Justice's Court was void for want of jurisdiction, still the Superior Court had jurisdiction on appeal.

That the Justice's Court had jurisdiction appears from Section 112 of the Code of Civil Procedure (See Act of April 1, 1880, Amendments of C. C. P. for 1880, 35), passed to carry out the provisions of Sec. 11 of Art. vi, of the Constitution. The statute does not trench upon the jurisdiction of the Superior Court (see Sec. 5 of Art. 6 of Constitution), as regards the amount determinative of jurisdiction of the Court last named. The demand here is the amount for which judgment is asked, viz., two hundred and ninety-nine dollars, or the *ad damnum* clause (*Solomon v. Reese*, 34 Cal. 33; *Maxfield v. Johnson*, 30 id. 545; *Skillman v. Lachman*, 23 id. 198), and the value of the property in controversy is two hundred and fifty dollars. Adopting either criterion of jurisdiction, the amount named in the *ad damnum* clause or the value of the property, the Justice's Court possessed jurisdiction.

It is said that the plaintiff did not waive any part of his claim, which amounted to three hundred dollars. But he did waive it by asking judgment for two hundred and ninety-nine dollars. Such a prayer for judgment was intended to be a waiver and should be so construed.

We are of opinion that the Justice's Court had jurisdiction; but whether it had jurisdiction or not, the Superior Court had jurisdiction of the appeal, and it follows that the petitioner is not entitled to the writ.

The application should therefore be denied, and it is so ordered.

MORRISON, C. J., and SHARPSTEIN, J., concurred.

[No. 8,241.—Department One.]
May 12, 1882.

LUTHER C. TIBBETS ET AL. v. THOMAS BLADE.

ACTION FOR PUBLIC NUISANCE—JUDGMENT ON THE PLEADINGS.—Appeal from a judgment for the defendant in an action for damages for a public nuisance committed by obstructing a highway, and from an order denying a motion made by the plaintiff after judgment to set aside the judgment and enter judgment in his favor on the pleadings.

Held: The motion was irregular and was properly denied; and if a like notice had been made at the commencement of the action, it should have been denied, because all the material allegations of the complaint are denied in the answer.

ID.—EVIDENCE—EJECTMENT.—Even if the action could be construed as in ejectment for the premises alleged to have been intruded upon by the defendant, evidence as to the intrusion was properly excluded in the absence of evidence of seisin or possession by plaintiff.

ID.—COMPLAINT.—But the complaint clearly shows that the action is to recover damages for a public nuisance and is defective in not alleging special damages to the plaintiff.

APPEAL from a judgment for the defendant and from an order rendered after judgment in the Superior Court of San Bernardino County. **ROLFE, J.**

The complaint was as follows:

Plaintiffs complain and allege that a short time anterior to the twelfth day of March, 1879, they were the owners and possessors of the one quarter section, west one half of southwest one quarter of section thirty-four, township two, south range five west, containing eighty acres of land.

That plaintiffs appropriated over twenty-five feet on the west side of said land, running the entire distance of half a mile towards a public road called Magnolia avenue, running north and south, and plaintiffs set thereon a row of pepper and eucalyptus trees eight feet apart, two thirds the entire distance in a straight line, on said avenue.

That on the twelfth day of March, 1879, plaintiff sold and deeded to one Elvira D. Bartlett part of said described land, commencing at a point on said avenue leading from Riverside to Temescal, thirty rods and twelve feet from the northwest corner of the Government survey of said lot of land, and running south two hundred and nine feet parallel with said

avenue, thence at right angles two hundred and eight and one half feet, thence at right angles two hundred and nine feet, thence right angles two hundred and eight and one half feet to the place of beginning, containing one acre and sixteen square feet of land.

The plaintiffs sold and deeded to said Bartlett up to and parallel with said trees set out and owned and held by plaintiffs, but did not include said trees nor the land on which they stood, and plaintiffs measured off said land and put good and substantial stakes on the four corners so that there could be no mistake about the line.

That said Bartlett did, on or about the ninth day of October, 1880, sell said land herein described to defendant, and defendant moved thereon an old blacksmith shop, and defendant cut down and destroyed several of said trees, and erected said shop some two feet over the line herein described, and on said avenue, thereby breaking said straight line of trees and taking in some two hundred and eighteen square feet of land belonging to plaintiffs more than was sold and deeded to said Bartlett.

That when defendant was constructing his said shop on said land, plaintiffs often called defendant's attention to the fact that defendant was trespassing over the line and upon plaintiffs' land, dedicated to said avenue, but defendant willfully and maliciously persisted in building and holding over said line as herein described, notwithstanding plaintiff pointing out to defendant the corner-posts put in by plaintiffs, and which defendant took up or broke down in order to extend said shop over said line. And plaintiffs further complain and allege that defendant has taken exclusive possession of a certain portion of said highway, to wit: some two feet by one hundred and nine feet, thereby excluding the public from the use of it as a public highway, and thereby destroying the design of a sidewalk, and destroying the straight line of trees and the beauty of said avenue, and thereby depreciating the value of plaintiffs' land herein set forth. And, further, that defendant has constantly, in front of said shop and in the public highway, a lot of old wagons, plows, cultivators, harrows and other articles for repair which disturbs the public travel and destroys the beauty and symmetry of said avenue.

That said shop, situated as it is, some two feet in the public traveled road, and the old, dilapidated state it is in, the same is a nuisance to plaintiffs and to the community and traveling public.

That all right and title to said land, constituting the part appropriated for said avenue by plaintiffs, is in the name of plaintiffs, there having been no sale or deed given to the county, and it not having been appropriated for the period of five years.

Wherefore plaintiffs allege that they have sustained the sum of five hundred dollars damage. And plaintiffs pray judgment that defendant is indebted to them in the sum of five hundred dollars damage, and that said nuisance be abated by the removal of said blacksmith shop from said public road, and far back on defendant's land sufficient for his customers to leave their wagons and farming utensils for repair in front without obstructing said highway, together with costs of this action.

"LUTHER C. TIBBETS."

[Duly verified.]

Luther C. Tibbets, (in person) for Appellants.

Harris & Allen, for Respondent.

THE COURT:

After verdict in favor of defendant, and judgment thereon, plaintiff moved to set aside the judgment and for judgment in his favor on the pleadings for five hundred dollars—expressly waiving a motion for new trial. The motion was irregular and was properly denied.

But even if the like motion had been made at the commencement of the trial, it should have been denied, because, all the material averments of the complaint are denied by the answer.

If disconnected statements of facts can be culled from the complaint such as might constitute the statement of a cause of action in *ejectment*, the objections made by defendant to evidence offered by plaintiff (as the same are set forth in the bill of exceptions) were properly sustained, in the absence of

evidence of seisin or possession by plaintiff of the premises alleged to have been intruded upon by defendant.

But the complaint clearly shows that the action is brought to recover damages for a public nuisance committed by obstructing a highway. The complaint contains no averment of facts showing special damage such as would authorize a private person to maintain the action.

Judgment and order affirmed, with twenty-five per centum damages.

[No. 6,935.—Department One.]

May 12, 1882.

JACOB SCHREIBER ET AL. v. J. H. WHITNEY ET AL.

NEW TRIAL—AUTHENTICATION OF STATEMENT—CERTIFICATE.—A motion for new trial was submitted upon a statement certified to be correct by the attorneys of both parties. *Held:* The statement not being signed and certified by the Judge of the Court below, as required by Sub. 4, § 659 C. C. P., must be disregarded.

APPEAL from a judgment for the defendants and an order denying a new trial in the Nineteenth District Court, City and County of San Francisco. WHEELER, J.

Material allegations of the complaint were denied by the answer and there were no findings.

The following stipulation is attached to the statement appearing in the transcript:

"It is hereby stipulated that the foregoing statement contains all the evidence and copies of all the original papers used in the trial of said cause, as they appear in the records and files of the Clerk of said Court.

"And it is agreed that the motion for a new trial be submitted upon said record.

"September 11, 1879.

"GEORGE TURNER,

"Attorney for Plaintiffs and Motion.

"GARBER & THORNTON & TEAL,

"Attorneys for Defendants."

Geo. Turner, for Appellant.

The Court has always enforced stipulations as being a waiver of objection, very rigidly. (*Weil v. Paul*, 22 Cal. 493; *Godchaux v. Mulford*, 26 id. 320; *Thompson v. Connolly*, 43 id. 638; *McCreery v. Everding*, 44 id. 248; *Sarver v. Garcia*, 49 id. 219; *Hill v. Finnigan*, 54 id. 311; *Donner v. Palmer*, 51 id. 630.)

The "Record" shows that the "Statement on motion for new trial" was agreed to by counsel. (*Vide* Transcript, 210.) "It is agreed that motion for a new trial be submitted on said record. Garber & Thornton & Teal, Attorneys for Defendants"—which shows the "Record" and "filing" were all "by consent."

Garber & Thornton and Benj. Teal, for Respondent.

THE COURT:

The document in the transcript, purporting to be a statement on motion for new trial, is not signed and certified by the Judge of the Court below, as required by Sub. 4, Sec. 659, C. C. P., and must be disregarded.

There is no error in the judgment roll.

Judgment and order affirmed.

[No. 10,733.—Department Two.]

May 12, 1882.

EX PARTE A. J. BALDWIN.

JUDGMENT FOR PAYMENT OF FINE—MISDEMEANOR—PUNISHMENT—SUNDAY LAW.—Upon a conviction for keeping open a place of business on Sunday, the judgment was "that the defendant pay a fine of fifty dollars, or be imprisoned in the County Jail * * * for the period of fifty days."

Held: As to the imprisonment of the defendant, the judgment is void, and affords no authority to any officer to hold him in custody.

ID.—ID.—The power of a Justice to impose imprisonment upon a defendant convicted of a misdemeanor, punishable only by fine is derived from § 1446, Penal Code, and can be exercised only in accordance with its provisions.

ID.—CASES DISTINGUISHED.—*Ex parte Kelly*, 28 Cal. 414; *Ex parte Chin Yan*, 8 P. C. L. J. 1113, and *Ex parte Ellis*, 54 Id. 204, distinguished.

APPLICATION for release on *habeas corpus*.

J. M. Lesser, for Petitioner.

The judgment at bar is that "the defendant pay a fine of fifty dollars, or be imprisoned in the County Jail of said County for the period of fifty days." Not in default of payment or until the fine be satisfied, or any equivalent of these expressions, but a judgment unauthorized by statute and certainly void according to the common law. (*Ex parte Murray*, 43 Cal. 457.)

The commitment cannot cure the judgment. A copy of the judgment is the only commitment authorized by law. (Pen. C., § 1455.)

W. D. Storey, District Attorney, and John C. Hall, Contra.
Cited *People v. Markham*, 7 Cal. 203; *Ex parte Kelly*, 28 id. 414; *Ex parte Ellis*, 54 id. 204.

THORNTON, J.:

In this case the petitioner, A. J. Baldwin, applies to be released from imprisonment on a writ of *habeas corpus*.

The petitioner was convicted of a misdemeanor, punishable by fine only. Judgment was entered against him, as appears in the commitment, as follows:

"In the Justices' Court of Branciforte Township, in the County of Santa Cruz, State of California. The people of the State of California:

"To the Sheriff of the County of Santa Cruz, greeting:

"Whereas, A. J. Baldwin has, on the twenty-third day of December, 1881, been convicted before me, L. Curtis, a Justice of the Peace of said Santa Cruz County, of the crime of misdemeanor, committed in said Santa Cruz County, on or about the fourth day of September, 1881:

"And whereas, upon such conviction I did consider and adjudge as follows, to wit:

"A judgment is entered against said defendant for the sum of fifty dollars, and it is ordered adjudged and decreed that the defendant pay a fine of fifty dollars or be imprisoned in the county jail of said county for the period of fifty days.

"I, L. Curtis, Justice of the Peace of said township and

county, do hereby certify that the foregoing is a full, true and correct copy of the judgment now of record in my office in the above mentioned action.

"(Signed)

L. CURTIS,

"Justice of the Peace in and for said county."

"And, whereas, the said A. J. Baldwin, although requested to pay said fine, has not paid the same:

"These are therefore to command you, the said Sheriff, to take and receive the said A. J. Baldwin into your custody, and imprison him in the county jail of said Santa Cruz county until he shall pay said fine, not exceeding fifty days.

"Given under my hand, at the township of Branciforte, in the county of Santa Cruz, this fifth day of January, 1882.

"(Signed)

L. CURTIS,

"Justice of the Peace in and for said County."

It appears that the petitioner was convicted of keeping a place of business open on Sunday for the purpose of transacting business on that day. On this conviction he was punishable by a fine not less than five nor more than fifty dollars.

The power in the justice to impose imprisonment on a defendant convicted as the defendant is, was dependent on the nonpayment of the fine. Such power is derivative, and results as a consequence upon something that must transpire after the judgment or sentence is rendered, viz: the nonpayment of the fine. Such power is derived from Section 1446 of the Penal Code, which is in these words:

"A judgment that a defendant pay a fine, may also direct that he be imprisoned until the fine be satisfied, in the proportion of one day's imprisonment for every dollar of the fine."

The preceding section provides "that when the defendant pleads guilty, or is convicted, either by a Court or by a jury, the Court must render judgment thereon of fine or imprisonment, or both as the case may be."

We are of opinion that the judgment of the justice to warrant imprisonment of a person convicted as was the petitioner, must be given and rendered in accordance with the provisions of Section 1446, and must contain the elements

therein prescribed. In our view such is the direction of this section (which relates to Justices' Courts), and this is made clearer by the requirements of the preceding section—1445. Both sections relate to the entry of judgments and direct what they must contain. Therefore it must be adjudged that the defendant pay a fine, specifying the amount, and in case the fine be not paid within a period specified in the judgment, that he (the defendant) be imprisoned until the fine is satisfied, in the proportion of one day's imprisonment for every dollar of the fine—as in the case before us the judgment should have been, "that the defendant pay a fine of fifty dollars, and in case said fine be not paid by the — day of — that the defendant be imprisoned until the fine be duly satisfied, in the proportion of one day's imprisonment for every dollar of the fine, and on the payment of such portion of said fine as shall not have been satisfied by imprisonment at the rate above prescribed, that the defendant be discharged from custody."

The judgment as rendered and entered was beyond the power vested in the justice to render, so far as it adjudged imprisonment; as to the imprisonment of the defendant it is void, and affords no authority to any officer to hold him in custody. (*Ex parte Lange*, 18 Wall. 163). As the judgment in this case is rendered, the officer holding the prisoner in custody could not release him even if he had suffered imprisonment for forty-nine days, unless the defendant paid the whole fine.

The judgments in *Ex parte Kelly*, 28 Cal. 414, and *Ex parte Chin Yan*, 8 Pac. C. Law Journal, 1113, are different from the judgment in this case, as will be apparent on comparing them. *Ex parte Ellis*, 54 Cal. 204, was decided on a section of the Penal Code (1205) different in its language from Section 1446, on which this cause turns.

The petitioner is hereby ordered to be set at liberty.

MORRISON, C. J., and SHARPSTEIN, J., concurred.

[No. 7,098.—In Bank.]

May 13, 1882.

J. M. SOTO ET AL. v. SAMUEL IRVINE.

NEW TRIAL—EJECTMENT—POSSESSION—SUFFICIENCY OF FINDINGS—DECISION AGAINST LAW.—In an action of ejectment issue was taken on the allegation of possession by defendant at the commencement of the action, and on this issue evidential facts were found by the Court, but not the ultimate fact of possessed or not possessed.

Held: There being no finding on this issue the decision of the Court below was against law, and a new trial was rightly granted.

APPEAL from an order setting aside a judgment for defendant and granting plaintiff's motion for a new trial in the Superior Court of the County of Monterey. **ALEXANDER, J.**

The findings of the Court as to the possession of the defendants were as follows:

"6. In the month of February, 1878, the defendant, with others, entered upon said tract and planted trees, and cultivated portions of the same.

"This entry and these acts were by them performed as citizens for the purpose of maintaining and improving the same as a public square, and not as pretending or asserting any private ownership or control of the same. The defendant and those so associated with him, were and are citizens of the town of 'Santa Rita,' and residents of said place.

"7. The plaintiff forbid them planting said square, or entering upon the same, or in any way interfering with the same. All of which notices and warnings defendant wholly disregarded."

Webb & Wall and *W. H. Collins*, for Appellant.

An error upon the face of the judgment may be taken advantage of by appeal from the judgment. Can a party upon a motion for a new trial in the absence of either statement, affidavits or bill of exceptions, made, served and settled in the manner required by law, fall back upon some error upon the face of the judgment roll, having failed to appeal from the judgment or to have directed either the Court or his opponent to the alleged error? We contend not.

1. *Cummings v. Conlan*, 66 Cal. 414.

New trials as such are granted, for matters *dehors* the record. Motions in arrest of judgment, or appeals from same, are on the other hand for matters appearing upon the face of the record. (Hilliard on New Trials, Second Edition, 20, 39.)

Admitting for the sake of argument a fact which under the statement in this case we do not concede, that the Court can look at the findings and judgments thereon for the purpose of discovering error, as between the two we find neither discrepancy or error.

Grounds of error other than those assigned are considered abandoned. (*Beams v. Emanuelli et al*, 36 Cal. 117; *People v. C. P. R. R. Co.*, 43 id. 399; *Hawkins v. Abbott et al.*, 40 id. 639.)

R. M. F. Soto, for Respondents.

How the motion for a new trial is to be made, see C. C. P. § 658. But we respectfully maintain that when the decision (findings of fact and conclusions of law) is upon its face against law, no statement or bill of exceptions is necessary; for the motion on that ground would derive no support from the statement or bill, and the omission to have any statement or bill of exceptions or any specifications therein showing wherein the decision is against law, raises no presumption that that ground is waived. (*Putnam v. Lamphier*, 36 Cal. 151-8; *Morley v. Elkins*, 37 id. 454-7; *S. P. R. R. Co. v. Superior Court, Kern Co.*, 8 P. C. L. J. 1015; *People v. Maguire*, 26 Cal. 641.)

A motion for a new trial is merely a remedy (*Kelly v. Larkin*, 47 Cal. 58), and is governed by the Practice Act, (C. C. P.) which being entirely remedial (*Hastings v. Cunningham*, 39 Cal. 142), must be liberally construed so as to "bring within its scope every case which comes clearly within its spirit and policy." (*Wallace v. Moody*, 26 Cal. 392; *Cormerais v. Genella*, 22 Cal. 125; *Kent v. Laffan*, 2 Cal. 596; C. C. P. § 4.)

The Legislature has said that when the decision (the findings of fact and conclusions of law—C. C. P., Secs. 632-3) is against law, the party complaining on that ground shall have a new trial (C. C. P., Sec. 657, Subd. 6), though he may concede, we claim, that all the facts as found are sustained by the evidence. That may not be the ancient rule; but the

Legislature has power to provide and alter the procedure and remedies. (*People v. Supervisors*, 70 N. Y. 229.)

The COURT :

In this cause, which is ejectment, issue was taken on the allegation of possession by defendant of the premises sued for when the action was commenced. On this issue there is no finding by the Court below. There should have been a finding on all the issues. The Court should have found whether defendant was possessed of the parcel of land sued for or not. Evidential facts were found by the Court, and not the ultimate fact of possessed or not possessed. There being no finding on this issue, the decision of the Court below is against law. The cause should for this reason be retired.

The order granting a new trial is therefore affirmed.

[No. 10,755.—Morrison, C. J.]
May 13, 1882.

EX PARTE EDWARD BULGER.

BATTERY—PUNISHMENT—HABEAS CORPUS.—The defendant was convicted of the crime of battery and sentenced to three years imprisonment in the House of Correction.

Held : Battery is punishable by fine * * * or by imprisonment in the County Jail not exceeding six months or by both. The prisoner has been in prison for the term of six months.

APPLICATION for discharge on writ of *habeas corpus*.

M. J. Horan, for Petitioner.

MORRISON, C. J. :

On the second day of November, 1881, the petitioner, Edward Bulger was convicted in the Superior Court of the city and county of San Francisco of the crime of "Battery," was sentenced by the Court to *three years* imprisonment in the House of Correction, and now, after having been confined there for six months, applies to be discharged from further punishment under the judgment of the Superior Court.

Section 243 of the Penal Code provides that "battery is

punishable by fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding *six months*, or by both." The petitioner has been imprisoned for the term of six months and should be discharged.

It is so ordered.

[No. 7,968.—Department One.]

May 17, 1882.

S. H. HARMON ET AL. v. GUSTAVUS S. ASHMEAD ET AL.

FORECLOSURE OF MECHANIC'S LIEN—LIEN—PREMATURE ACTION.—In an action by several plaintiffs (under § 1195, C. C. P.) to foreclose separate mechanics' liens, it was alleged with reference to each cause of action that the defendant promised to pay the agreed amount "upon the completion of the building;" and also that at the time of the commencement of this action the building was not completed.

Held: There can be no foreclosure of a lien until the debt for which the lien is made and held as security has become payable.

ID.—PLEADING—WAIVER OF DEFECTS CURED BY VERDICT OR DEFAULT.—Defects in the statement of a cause of action may be cured by failing to answer or by verdict, but not a defective cause of action.

APPEAL from a judgment for the plaintiff and from an order denying a new trial in the Superior Court of the City and County of San Francisco. **EVANS, J.**

J. F. Cowdery and Wm. H. Fifield, for Appellants.

The complaint fails to state a cause of action; indeed it shows on its face that no cause of action has yet accrued. (C. C. P. § 434; *Rogers v. Shannon*, 52 Cal. 107-8; *Haskell v. Moore*, 29 id. 438-9; *Campbell v. Jones*, 38 id. 508; *Hoag v. Warden*, 37 id. 522; *Abbe v. Murr*, 14 id. 210; *Choynski v. Cohen*, 39 id. 502.) A mechanic's lien cannot be foreclosed until the debt for which it is security has become payable. The complaint must show a cause of action. (*Hardin v. Marble*, 13 Bush, Ky. 58; *Preusser v. Florence*, 4 Abb. New Cases, N. Y. 136; *Washington Township v. Bonney*, 45 Ind. 77; *Armstrong v. Rockwood*, 53 id. 506; *Gilbert v. Marshall*, 56 Ga. 148; *Campbell v. Jones*, 38 Cal. 508; *Frisch v. Caler*, 21 id. 71; *Roberts v. Treadwell*, 50 id. 520; *Hoag v. Warden*, 37 id. 522; *Bohall v. Diller*, 41 id. 532; *Kelly v. Mack*, 45 id. 303;

Choynski v. Cohen, 39 id. 502; *Abbe v. Marr*, 14 id. 210; *Rogers v. Cody*, 8 id. 324; *Jolley v. Plant*, 1 McArthur's Rep. 93; *Alexandria R. R. Co. v. Nat. Junc. R. R. Co.*, 1 McArthur's Rep. 203.)

E. S. Pillsbury, for Respondents.

If the action appeared on the face of the complaint to be prematurely brought, it might be ground for demurrer or defense by way of a plea in abatement, but in the absence of these and it appearing on the face of the complaint that the money was owing to respondents and unpaid, and that they had performed their several contracts on their part, there is sufficient to support the judgment; the objections must have been taken in the Court below, and will be deemed by this Court to have been waived. (*Hillman v. Newington*, 57 Cal. 56; *Bank of Stockton v. Howland*, 42 id. 129, 134; *Hentsch v. Porter*, 10 id. 555; C. C. P. § 1190.)

McKEE, J.:

In this case eight persons claiming separate mechanics' liens upon the property described in the complaint, brought a single suit to foreclose them, pursuant to Section 1195 of the Code of Civil Procedure, which permits any number of persons claiming liens upon a building or structure to join, as plaintiffs in one action, to establish and enforce their several liens. Of the defendants to the action Ashmead made default. The others answered by specifically denying some of the allegations of facts which constituted the eight causes of action contained in the complaint.

Substantially, the allegations of each of the causes of action are that Ashmead, being the equitable owner and in possession of the premises upon which it is sought to establish the several liens, was engaged in building a house on the premises; that, at his instance and request, the plaintiffs, severally, verbally agreed to furnish him with building material to be used in its construction, for which he undertook and promised to pay each of them, in gold coin, "upon the completion of the building," the market value of the materials at the time they were furnished and delivered. Each of the plaintiffs performed his agreement by delivering to Ashmead,

from time to time, between April, 1877, and April 1, 1878, the materials which he contracted to furnish, and they were used by Ashmead in the construction of the building; that, at the time they were delivered, they were of the market value of the sum specified in the complaint; that this sum was unpaid April 1, 1878, and, to secure payment thereof, each of the plaintiffs, on April 6, 1878, and "within sixty days after the completion of said building," filed and recorded his claim of a mechanic's lien duly verified according to Section 1187, C. C. P.; but it is also alleged "that, at the time of the commencement of this action (June 24, 1878), the building or structure was not completed."

There is no denial of the last allegation by the answer on file, or of the terms of the contract between the builder and the material-men. The issuable averments on those subjects are therefore admitted by all parties to the controversy. No reason is assigned for the non-completion of the building. It is not alleged that Ashmead abandoned the work, or broke the contract between him and the material-men; or that he and they, subsequently to the making of the same, changed or modified it in any respect. The pleader admits that it was unchanged and unaltered, and that, at the commencement of the action, the debt had not become due according to the terms of the contract; there was therefore no breach of contract and no cause of action.

It is familiar law that there can be no foreclosure of a lien until the debt for which the lien is made and held as security has become payable. In such an action, as in all other actions, the complaint must show a cause of action, otherwise it will not support a judgment; right in the plaintiff and a correlative wrong in the defendant are essential elements in every law suit. (*Kinsey v. Wallace*, 36 Cal. 463; *Abbe v. Marr*, 14 id. 210; *Choynski v. Cohen*, 39 id. 502; *Frisch v. Caler*, 21 id. 71; *Roberts v. Treadwell*, 50 id. 521.)

But it is urged that as Ashmead made default, and the others did not interpose a demurrer to the complaint, or a plea in abatement, that the defect in the statement of the cause of action was waived, and cured by the finding and judgment of the Court below. Of course, irregularities or defects in the statement of a cause of action may be waived by failing to

answer, or by answering to the merits. But in the complaint in this case there is neither irregularity nor defect in the statement of the plaintiffs' cause of action as to the terms of the contract, or the time for its performance. Performance was due when the building was completed; but, as the plaintiffs allege, "the building has not been completed," therefore, although liens may have attached to the building as security for the value of the materials furnished by the material-men, and which were used in the building, the time for payment had not arrived when the plaintiffs commenced their action. These allegations are not a defective statement of a cause of action; on the contrary, they are a perfect statement of a defective cause of action, and a defective cause of action is not cured by failure to answer or by verdict. (*Wheatley v. Lane*, 1 Wm. Saund. 218, e. note; *Lincoln v. Iron Co.*, 103 U. S. 412; *Abbe v. Marr*, and *Choynski v. Cohen*, *supra*.)

On the face of the complaint the contract, as originally made by the owner of the building and the material-men, was in full force at the commencement of the action. In point of fact it was either in that condition or it had been varied or terminated before the time for payment had arrived according to its terms. If it had been terminated or varied by any of the modes known to the law—either by an abandonment, or by mutual consent of the parties to the contract, or otherwise, it should have been stated by suitable averments, for the rights of the parties depend on the mode in which it was changed or terminated. In the absence of such averments the contract as alleged remains in full force, and as the time for performance according to its terms has not arrived, it is not broken and there is no cause of action. While a contract remains in force the rights and remedies of the parties to it are determined according to its terms.

The judgment and order must therefore be reversed; and as it has been urged on the argument that the contract was in fact terminated before the suit was commenced, the plaintiffs will have an opportunity, upon the going down of the remittitur, to apply to the Court below for leave to amend their complaint.

Judgment accordingly.

ROSS, J., and MORRISON, C. J., concurred.

[No. 6,996.—Department Two.]
May 22, 1882.

WILLIAM HALL v. JAMES S. BOYD ET AL.

ESTOPPEL BY JUDGMENT—EVIDENCE—EJECTMENT—MORTGAGE SALE—COMMISSIONER'S DEED—ATTORNEY IN FACT.—In an action of ejectment, the plaintiff deraigned title under a commissioner's deed made in pursuance of a judgment recovered by him in an action against the defendant's grantor, commenced after the defendant's purchase and to which he was not a party; and relied upon the record of that case for proof of material facts. *Held*: The defendant is not bound by the judgment.

APPEAL from a judgment for the defendant and from an order denying a new trial in the Fifteenth District Court, City and County of San Francisco. DWINELLE, J.

The action was ejectment; and the only proofs introduced on the trial (except evidence is to the identity of the premises,) were the mortgage and deeds and the record referred to in the opinion.

Lyman I. Mowry, for Appellant.

The conveyance made by Reynolds, as Commissioner, under the decree in *Hall v. Boyd et al.*, passed the fee from Laskie to William Hall, the plaintiff herein. (*Bergen v. Bennett*, 1 Caine's Cas. 15; S. C., 2 Am. Dec. 281; *Wilson v. Troup*, 2 Cow. 236; S. C., 14 Am. Dec. 458.)

W. W. Cope, for Respondents.

The deed from Mathews to James Hall was a mere nullity. It did not convey the title of Laskie, nor operate as an assignment of the mortgage. (*Peters v. The Jamestown Bridge Company*, 5 Cal. 334; *Nagle v. Macy*, 9 id. 426; 1 Jones on Mortgages, Sec. 808, and cases cited.) But the law on the subject is perfectly well settled. When a judgment is offered against a stranger as a muniment of title, it is admitted on the same principle as a conveyance, and its effect as evidence is limited to the fact of its own existence, and the legal consequences resulting from it. The supposed facts on which the judgment was based must be proved *aliunde*. (Phillips on Evidence; Cowen & Hill's Notes, Part, 2 p. 45; *Lovell v. Arnold*, 2 Munf.

167; *Wardlaw v. Hammond*, 9 Rich. Law, 454; *Hooper v. Pair*, 3 Port. Ala. 401; S. C., 29 Am. Dec. 258; *Snodgrass v. Bank of Decatur*, 25 Ala. 175; *Archer v. Bacon*, 12 Mo. 156; *Putnam Free School v. Fisher*, 34 Me. 175; *Wilson v. Davol*, 5 Bosw. 624; *Rowland v. Day*, 17 Ala. 684; *Hollingsworth v. Barbour*, 4 Pet. U. S. 477, C. C. F. §§ 282, 389.)

W. H. Tomkins, also for Appellant in reply.

Laskie executed the mortgage to Mathews as security for the payment of five hundred dollars. The mortgage contained a power of sale by which Mathews was authorized to sell the land in the event of non-payment of the money within three months on giving the notice specified in the mortgage. This was a power coupled with an interest, Mathews therefore, was not merely the agent of Laskie, he had an interest in the subject matter, and for that reason his power was irrevocable. (Jones on Mortgages, Secs. 1792, 1794, and cases cited.)

The sale having been made by Mathews to James Hall, who paid the purchase money to Mathews, the debt was thereby paid, and the note and mortgage became as worthless as two blank pieces of paper.

My associates' authorities on this point seem to be conclusive, even if the respondent were, as he claims to be, a *bona fide* purchaser.

But he is not a *bona fide* purchaser. There is no evidence showing or tending to show, that he paid any consideration for the note or mortgage, or that he had no notice of the sale by Mathews to James Hall. (*Long v. Dollarhide*, 24 Cal. 227; *Galland v. Jackman*, 26 Cal. 88; Jones on Mort. Sec. 1891; *Speer v. Haddock*, 31 Ill. 439.)

The doctrine of relation is referred to by my associate, and he has cited the case of *Gibson v. Chouteau*, 13 Wall. 100. I think the principle is decisive of the case at bar. (*Merrill v. Chapman*, 34 Cal. 253; *Waterman v. Smith*, 13 id. 373; *Moore v. Wilkinson*, 13 id. 478; *Leese v. Clark*, 18 id. 535; *Leese v. Clark*, 20 id. 387; *Seale v. Ford*, 29 id. 104; Rorer on Judicial Sales, § 366, p. 36, 976; *Osterberg v. Union Trust Co.*, 93 U. S. 424; Jones on Mortgages, § 1654, and cases cited.)

It is a plain proposition that the respondent claiming title under Laskie, by the foreclosure decree sale and deed, having obtained in fact his deed prior to the plaintiff's deed, but in law ten years subsequent by relation, is a subsequent purchase from Laskie and privy to his title, and therefore all the recitals in plaintiff's judgment and deed are conclusive upon him. (*Munroe v. Parkhurst*, 9 Wend. 209; *Jackson v. Brooks*, 8 Wend. 426; *Carver v. Astor*, 4 Pet. 1, 82, 83; *Crane v. Morris's Lessee*, 6 Pet. 598, 611.)

When Mathews sold the land to James Hall, under the power contained in the mortgage, he had exhausted his power, and a subsequent purchaser purchased at his peril. (*Swan v. Saddlemire*, 8 Wend. 681; *Craft v. Merrill*, 14 N. Y. 460-1; *Jackson v. Clark*, 18 Johns. 441.)

MYRICK, J.:

This is an action of ejectment. Judgment went for defendant, from which, and from the order denying motion for new trial, plaintiff appealed.

On the first of January, 1850, one Laskie was the owner of the premises in controversy. On the second of October, 1850, Laskie, for the purpose of securing the payment, on or before January 15, 1851, of a promissory note for five hundred dollars and interest, executed to one Matthews a mortgage of said premises, which mortgage contained a clause, that in case of failure in the payment of the money secured, said Laskie constituted said Matthews his attorney in fact, with power and authority to sell the mortgaged premises, at public auction, to the highest bidder, for cash, on giving notice as prescribed, and "to execute, deliver and acknowledge a proper and sufficient deed or deeds of conveyance, in his name, as his attorney in fact, to the purchaser or purchasers." June 11, 1851, said Matthews, in his own name as grantor, for the consideration named of four hundred dollars executed to James Hall a quitclaim deed of the premises. In this deed no reference was made to the mortgage or to the power therein contained, nor to Laskie. In 1861 the defendant, Boyd, purchased from Matthews the promissory note and mortgage, and brought an action for the foreclosure of the mortgage, in which action such proceedings were had that a

decree of foreclosure and sale was made, a sale was had and a deed thereunder executed to Boyd. Laskie, Matthews, and others (not including James Hall or plaintiff), were made defendants in this action. Upon the sale a deficiency existed, for which judgment was docketed, and a sale on execution was had of the premises to one Turney, who conveyed to defendant Boyd.

These proceedings on the foreclosure and sales occurred during the years 1861, 1862, and 1863. In 1876 the plaintiff herein, William Hall, commenced an action against said Henry Matthews and the defendant Boyd, alleging the execution of the note and mortgage before mentioned, from Laskie to Matthews, its non-payment, the sale by Matthews to James Hall for four hundred dollars, which amount satisfied the debt from Laskie to Matthews; that in executing the deed from Matthews to Hall, Matthews did not comply with the terms and conditions of the power of sale, and that the deed was not sufficient to convey the title to said James Hall; that James Hall had died, leaving plaintiff, Wm. Hall, his sole surviving heir at law; also, alleging a pretended assignment and transfer of the mortgage and possession of the premises by Boyd under foreclosure proceedings based on such mortgage and assignment; and praying that Matthews execute to said Wm. Hall a proper deed under said power, and that the pretended assignment from Laskie to Boyd be annulled, etc. This action was subsequently dismissed as to Boyd, but such proceedings were had that judgment was rendered against Matthews, a Commissioner was directed to execute a deed, and a deed was executed accordingly.

From the facts presented to us, the judgment of the Court below was correct. The defendant, Boyd, was not a party to the judgment rendered in the action brought by the plaintiff herein against Matthews, and is not bound thereby. It does not appear, other than by the judgment in that action, that James Hall is deceased, or that the plaintiff is his heir, or that the note and mortgage executed by Laskie to Matthews were paid out of the proceeds of the sale from Matthews to James Hall or otherwise, James Hall took nothing (as against Laskie) by the deed to him from Matthews; the grantor named in that deed had no legal estate to convey; he did not assume

or pretend to act under the mortgage or the power therein contained; the power was, expressly, that he might convey in the name of, and as attorney in fact of Laskie, and no attempt was made to act in that way or in that capacity. It is true that Matthews had a power, coupled with an interest, but that power was to act as an attorney in fact, and the interest was that he might by acting as such attorney accomplish the payment of his debt. Neither was the deed an assignment or extinguishment of the debt referred to in the note and mortgage; but the debt and security remained in Matthews, and were by him assigned to Boyd, who became the owner thereof and by the foreclosure proceedings acquired the title to the premises.

Judgment and order affirmed.

THORNTON and SHARPSTEIN, JJ., concurred.

[No. 7,877.—Department One.]

May 26, 1882.

CHARLES ALPERS ET AL. v. BENJAMIN W. BROWN
ET AL.

ORDINANCE—CONSTRUCTION OF CONTRACT—REMOVAL OF DEAD ANIMALS.—An ordinance of the City of San Francisco provided that, whenever any horse or other animal should die within the limits of the city and county, the owner thereof or the person, in whose possession the same might be at the time of its death, should dispose of its carcass in such a manner that the same should not become a nuisance or should notify W. or his associates or assigns within twenty-four hours where such carcass might be found, etc.; and also provided that no person other than the said W. or his associates or assigns or the person owning or having possession of any animal at the time of its death should remove or dispose of the carcass of such animal unless the said W. and his associates and assigns should fail to remove the same within twenty-four hours after receiving notice thereof.

Held : By the provisions of this ordinance the owner or the person, in whose possession the animal should be when death occurred, was given the right to dispose of the carcass in such a manner as not to become a nuisance at any time within twenty-four hours after death, and it was competent for him to exercise that right in any way he should see fit by contract or otherwise.

APPEAL from a judgment for the plaintiff in the Superior Court of the City and County of San Francisco. WILSON, J.

The complaint alleged the execution of the contract hereinafter set forth between Wetzlar and the city and the passage of the ordinance referred to in the opinion; and further alleged that the defendants under the name and style of "The San Francisco Company for the Removal of Dead Animals, in open and direct violation of plaintiffs' rights under said contract, unlawfully set up and established order boxes for their own use and benefit, for the reception of orders for the removal of dead animals, similar to those set up and established by plaintiffs for their use and like purpose, in the same localities, at which localities defendants stationed and maintained men and teams for the receipt of orders and removal of dead animals, and have ever since, by themselves and their employes, continued to take, receive and intercept said orders, and to remove said dead animals, and still continue so to do, to plaintiffs' great wrong and damage, to wit: damage in the sum of two thousand dollars, gold coin; and that defendants gave out and threatened that they will persist and continue in the commission of their wrongful acts, aforesaid, and plaintiffs have good and sufficient reason to believe, and do believe, that defendants will so persist and continue, unless restrained therefrom by the order and injunction of this Court.

The contract was as follows:

"This agreement, made and entered into this twenty-ninth day of May, A. D. 1866, between the City and County of San Francisco, of the first part, and Gustavus Wetzlar, of the second part.

"Witnesseth, that the said party of the second part, for the consideration of one dollar to him in hand paid, the receipt of which is hereby acknowledged, and of the covenants on the part of the party of the first part to be kept and performed, hereby covenants, promises and agrees, that he will, at his own cost and expense for the period of twenty (20) years from the date hereof, remove and take away all dead carcasses of horses and cattle in the City of San Francisco, to some place where the carcasses shall be disposed of in such a manner as not at any time to become a nuisance.

"The mode and manner of their disposition to be at all times subject to the sanitary regulations and control of the Board of Supervisors of the City and County of San Francisco, and such removal to be made, in every instance, immediately upon receiving notice of the existence of any such dead carcass.

"And the said party of the first part, in consideration of the removal aforesaid, hereby covenants and agrees, that said party of the second part shall have the exclusive privilege of taking away and removing, as aforesaid, all such dead carcasses of horses and cattle in the City of San Francisco for the period of twenty years from the date hereof.

"Such exclusive privilege to be secured to said party of the second part by proper ordinance, requiring notice to be given to said party of the second part in every case of death of horses and cattle. And it is agreed that said Wetzlar shall, during said period of twenty years, keep an office or place of business in some central location, where notice may be given of the existence of any such dead carcass."

The answer alleged that heretofore and prior to the commencement of this action, the defendants made and entered into agreements with divers and sundry street railroad companies, livery stable keepers and other persons, whereby it was covenanted and agreed by and between the defendants and the corporations and persons with whom such contracts were made, that such corporations or persons should deliver to them, said defendants, for a period of one year, the dead carcass, or carcasses, of any and all animals belonging to such corporations or persons, dying within said city and county during such period, and defendants, in consideration thereof, should remove said carcass or carcasses without cost or expense to such owner or owners, and dispose of the same so as not to create a nuisance in said city and county, or elsewhere, and that in pursuance of said contracts these defendants have provided teams for the removal of any and all carcasses which may be so received by them under said contracts, and have provided works, buildings, and machinery necessary for the disposition thereof, so as not at any time to create a nuisance in said city and county, and in and about the premises have

expended a large sum of money, to wit: fifteen hundred dollars, or thereabouts.

The Court in effect found these allegations of the complaint and answer to be true; and further found that in no case have they removed carcasses of dead animals belonging to others than those with whom they had contracts as aforesaid.

That such carcasses were uniformly removed from the private premises of said corporations or persons with whom the defendants had contracts as aforesaid, with one exception, namely, that one dead horse was removed by them from Sutter street in said city and county, which dead horse belonged to the Sutter street Railroad Company, with which corporation the defendants had a contract as aforesaid; that the dead carcasses of dead horses and cattle are worth from five dollars to ten dollars each.

F. G. Newlands, for Appellants.

Plaintiff's special privilege is, in the extent and scope claimed, a monopoly. This privilege, if conceded to be as extensive in its application as claimed in the Court below, deprives the owners of their property in dead animals, without due process of law, and imposes a burden without a corresponding benefit. It is in restraint of trade; it is unreasonable and oppressive. The contract, and ordinances passed in aid of it, are, therefore, void. (Dillon on Munic. Corpor. §§ 55, 253-255, 257-259, 262; *Commissioners v. Gas Co.*, 12 Penn. St. 323; *Norwich Gas Co. v. Norwich City Gas Co.*, 25 Conn. 19; *Mayor v. Thorne*, 7 Paige, 263.)

The contract and ordinances referred to must be limited in their application to animals actually requiring removal—that is, animals in such a condition of putrefaction as to constitute a nuisance. They were not intended to take away from the owner the possession and the control of his property, or the power to dispose of it as he saw fit. The owner could remove it, or he could direct his servant to do so, or he could employ the defendants to do so. The act of the agent is the act of the principal. More than this, by the very terms of their contracts, the defendants became the owners of the carcasses immediately upon their death, and under the ordinances the owners had the right to remove such carcasses.

Even the strictest construction of Order No. 838 would only hold that the rights of plaintiffs attach at the expiration of twenty-four hours after the death of an animal. During this time the owner or his agent could remove—and it nowhere appears that the defendants did remove after the expiration of the twenty-four hours. For the construction of similar ordinances, see *Underwood v. Green*, 42 N. Y. 140.

James Mee, also for Appellant.

The contract is in direct violation of Article i, Section 8, of our then existing State Constitution (as borrowed from a leading provision of *Magna Charta*,) which declares that life, liberty and property shall not be taken from the citizen without due process of law. We find the contract and the ordinance at war with each other, the contract giving to G. Wetzlar alone the exclusive right to remove all dead animals in said city, and the ordinance permitting the owner or party in possession to remove the same. And the legislature ratified both. (Statute 1873-4, 886.)

The plaintiffs, no doubt, will contend in this Court, as I understand they did in the lower one, "that if the ordinance prevail instead of the contract, then, and in that event, that said ordinance must be strictly construed in this, that the owners or party in possession of such dead animals shall remove the same in person, not by agent or servant." Such a rule of construction would be to handicap the weak against the strong.

George Turner, Severance & Naphtaly, for Respondents.

As a sanitary measure, it is competent and legal for the city to provide, by ordinances and contract, for the removal of dead animals which may be found within the city limits. That they did make such contract with Gustave Wetzlar, and the contract was fully legalized by the legislature of this State, and this is the act of the sovereign power in the premises. It is plain, therefore, that all animals that die in said city "and require to be removed," "or may become nuisances," are to be removed first by owner or possessor, or next by Wetzlar or his assigns, and if Wetzlar or his assigns do not remove within twenty-four hours, any one can. It is a fair

and proper sanitary regulation and applies to all carcasses, whether on public or private grounds.

J. B. Crockett, also for Respondents.

It is claimed that, under Ordinance 838, the owner of the dead animal had the right, within twenty-four hours after its death, to so dispose of the carcass as to prevent it from becoming a nuisance; and it is said that, within the twenty-four hours the owner could either remove the carcass himself or authorize another to do it, and that there is no finding to the effect that any of the carcasses removed by the defendants under their contract, had become nuisances or were not removed within the twenty-four hours allowed the owner for that purpose. But the contract between the defendants and the owners of dead animals, as found by the Court, does not provide for the removal of the carcass, within twenty-four hours after death, or within any other definite period. Nor does it appear that any of the carcasses removed by the defendants were, in fact, removed within the twenty-four hours, or before they had become nuisances. If they relied upon this as a defense, it was incumbent on them to prove it as an affirmative fact; and to enable them to prove it, they should have averred it in the answer; but there is no such allegation. They seek to avail themselves of a special privilege reserved to the owner to remove the carcass within twenty-four hours after death, but have wholly failed to bring themselves within the terms of the privilege by averment or proof.

Ross, J. :

The plaintiffs claim the exclusive right to remove dead animals from the city and county of San Francisco, by virtue of a contract entered into between the city and county and one Wetzlar in the year 1866. The ordinance on which the asserted right is founded declares, in its first section, that "when-ever any horse, ass, swine, sheep or goat, or cattle of any kind shall die within the limits of the city and county of San Francisco, the owner thereof, or the person in whose possession the same may be at the time of its death shall dispose of the carcass in such a manner that the same shall not become a nuisance, or shall notify G. Wetzlar, or his associates or as-

signs, within twenty-four hours, where such carcass may be found," etc.: and a failure in this respect is declared to be a misdemeanor and punishable accordingly.

The second section declares, that "no person other than said G. Wetzlar, or his associates or assigns, or the person owning or having possession of any animal mentioned in the preceding section, at the time of its death, shall remove or dispose of the carcass of such animal, unless the said Wetzlar, his associates and assigns, shall fail to remove the same within twenty-four hours after receiving notice thereof, as herein before provided. And no person shall obstruct, hinder or in any manner interfere with the said Wetzlar, or his associates or assigns, in the removal or disposition of any such carcass." A violation of this section is also declared to be a misdemeanor and punishable.

By the provisions of this ordinance the owner, or the person in whose possession the animals should be when death occurred, was given the right to dispose of the carcass in such a manner as not to become a nuisance, at any time within twenty-four hours after death; and Wetzlar's right to remove them did not attach until the expiration of the said period of twenty-four hours or until he should receive notice of the death and where the carcass could be found, from the owner or the person in possession. In the present case neither the findings nor the complaint show that the defendants have ever removed any dead animal from the City and County of San Francisco at any time when the plaintiffs had that right, or that the defendants threatened to do so. The findings do show that defendants have contracted for the period of one year with certain street railroad companies, livery stable keepers, and other persons, for the removal of such animals belonging to such companies and persons as should die within the City and County of San Francisco, and for the disposition of the same in such manner as not to create a nuisance in the city and county or elsewhere.

But since by the ordinance the owner was given the right, up to the expiration of twenty-four hours after death, to dispose of the carcass in such a manner that the same should not become a nuisance, it was competent for him to exercise that right in any way he should see fit—by contract or other-

wise. And since by the terms of the ordinance the rights of the plaintiffs as assignees of Wetzlar do not arise until the expiration of twenty-four hours after the death of the animals, or until the receipt of notice as aforesaid, it was incumbent upon them to show, in order to maintain the action, an interference with those rights on the part of the defendants. The fact that the latter removed certain dead animals of the character mentioned in the ordinance, from the city and county, in such a way as to prevent the creation of nuisance, under a contract with the owners, does not show such interference. *Non constat* but that they were so removed within the twenty-four hours allowed the owners by the ordinance for that purpose. It could hardly have been contemplated by the Board of Supervisors that the owners of such animals as should die should exercise the privilege granted of removing them within the time stated *with their own hands*. At all events, there can be no doubt of their right to exercise that privilege through others.

Judgment reversed and cause remanded.

MCKINSTRY and MCKEE, JJ. concurred.

[No. 5,534.—Department One.]

May 26, 1882.

THE CHICAGO TAYLOR PRINTING PRESS COMPANY
v. NATHAN R. LOWELL.

REFLEVIN—PLEDGE BY CONSIGNEE OF GOODS—NOTICE.—Goods were shipped by the plaintiff to the California Type Foundry Company with the following written instructions; “as I wrote you before, I want you to keep these consignment goods as such—as my property until sold.” While the property was still in the warehouse of the Railroad Company the consignee pledged the goods to F. Bros. and the property was then placed in defendants’ custody to be kept in store for F. Bros.

Held: Passing the question whether the *mere possession* of property, under written instructions showing that the possessor has no title, would be sufficient evidence of ownership to protect the pledgee who advances his money on the bare statement of the possessor that he is the owner,—in *this case* the pledgor was not in the actual possession of the property at the time the loan was negotiated. F. Bros. must have seen (from the letter of instructions), that the plaintiff was the owner of the property, had they required some evidence of title in the proposed pledgor as they ought to have done.

APPEAL from an order refusing defendant a new trial in the Third District Court of the City and County of San Francisco. MCKEE, J.

Henry E. Highton, for Appellant.

The letter of instructions was not, like a bill of lading or an invoice, one of the usual documents accompanying a consignment of goods, and, therefore, its existence or contents not having been communicated to Forbes Bros. prior to the loan, it did not characterize the transaction or form part of the *res gestæ*, and on this ground was improperly admitted in evidence.

The letter of instructions on the claim of the respondent not having been brought to the knowledge of Forbes Bros., and the California Type Foundry Company asserting its ownership and having possession of the presses, the evidence showed that Forbes Bros. made all the inquiries they were called upon to prosecute.

The evidence showed that the California Type Foundry Company had ostensible authority to deal with the four presses as its own, and that it had been allowed by the respondent to assume the apparent ownership of the property for the purpose of making a transfer of it, and, therefore, the respondent could not set up its own title, if it had any, to defeat the pledge made by the California Type Foundry Company to Forbes Bros., who received the property in good faith, in the ordinary course of business, for value, and relying upon the representations and the actual possession of the company.

The leading case in this State, prior to the adoption of the Codes, was that of *Wright v. Solomon*, 19 Cal. 68, 70-77. This case, however, even if it were still an authority, would be inapplicable to this record, because the business of the California Type Foundry Company was not that of a factor or agent, and, the fact of agency in this particular instance not having been disclosed, it could not be reasonably claimed that Forbes Bros. dealt with the company as an agent or were charged with notice of the conditions under which the consignment was received.

The next case in this State, although not directly in point,

weakened the force of *Wright v. Solomon*. (*Goldstein v. Hort*, 30 Cal. 374-76.)

The next step was decisive. Here, as in England, and in New York and other States, the monstrous injustice of the law as previously declared was distinctly perceived, and a remedy applied by the Code Commissioners and the Legislature in the following enactments, which virtually wiped *Wright v. Solomon* out of existence. (C. C. §§ 2369, 2991; 2 Annotated Civil Code, 291, 295.) The new statute, to the full extent that is necessary for the purposes of this case, has been construed and applied by this Court. (*Green v. Campbell*, 52 Cal. 589, 590; and *vide Thompson v. Toland*, 48 id. 113; and *Green v. Campbell* is in harmony with the modern authorities. (Edwards on Factors and Brokers, §§ 56-59, pp. 78-82; *Cartwright v. Wilmerding*, 24 N. Y. 526-533; *McNeil v. Tenth National Bank*, 46 id. 329.)

Leonard Reynolds, for Respondent.

One who ships goods for sale on commission, and who does not entrust the consignee with any written *indicia* of title, is not required to see to it that the consignee exhibits the letter of instructions to parties dealing with him. On the contrary, it is the business of persons dealing with the consignee to call for the letter of instructions; and had Forbes Brothers done so in this instance they would not have lent money on a pledge of these goods. (*Wright v. Solomon*, 19 Cal. 72.)

The mere possession of goods is not a muniment of title, which will enable a factor or other agent to exceed his actual authority; and neither a factor, nor other agent, with power to sell, has by virtue merely of such power and the possession of the goods, without written *indicia* of title, any power to pledge the goods. (*Wright v. Solomon*, 19 Cal. 72; *McNeil v. Bank*, 46 N. Y. 329, 330; Story on Agency, §§ 78, 225-227.) The mere possession of another's property is not such evidence of ownership, that third persons have a right, as against the true owner to rely thereon. (*Sprights v. Hawley*, 39 N. Y. 448; *McNeil v. Bank*, 46 N. Y. 329, 330; *Ballard v. Burgett*, 40 N. Y. 314; *Robinson v. Haas*, 40 Cal. 479; *Butman v. Lamphier*, 36 id. 157; *Kohler v. Hayes*, 41 id.

457, 458.) Mere possession, therefore, is not "apparent ownership," within the meaning of Section 2991 of the Civil Code. That section is merely declaratory of an existing rule. (Story on Agency, § 443.)

But the California Type Foundry Company did not have the actual possession of the goods at the time the loan with Forbes Brothers was negotiated.

The COURT:

The case shows that the presses in controversy were the property of the plaintiff at the time they were pledged to Forbes Bros. by the California Type Foundry Company. The goods were shipped by the plaintiff by rail from Chicago and consigned to the California Type Foundry Company—three of the presses being so consigned for Painter & Co., of San Francisco, and the other press to be sold by the consignee for the account of the plaintiff. The consignment was accompanied by a letter of instructions from the President of the plaintiff corporation to the Vice President of the California Type Foundry Company, by which the latter was instructed, in the event of Painter's refusing to receive the presses shipped for him, to store them, and concluded with these words: "As I wrote you before, I want you to keep these consignment goods as such—as my property until sold, and well insured. This last is very important." None of the goods were delivered to Painter & Co., but shortly after their arrival in San Francisco, and while they were yet in the depot of the railroad company, the Secretary of the California Type Foundry Company applied to Forbes Bros. for a loan of two thousand dollars, to secure which he proposed to pledge the presses, at the time representing them to be the property of the Company of which he was Secretary. The member of the firm of Forbes Bros. to whom the application was made, after becoming satisfied of the sufficiency in value of the security, agreed to make the loan and did so accordingly. When the loan was made, Faulkner, at the request of Forbes Bros. placed the property in the defendant's custody as warehouseman, to be kept in store for Forbes Bros. as collateral security for the money advanced by them. Forbes Bros. were ignorant of the letter of instructions accompanying the

consignment, but they made no inquiries concerning the ownership of the property or the authority of the California Type Foundry Company, or of Faulkner, to pledge it. It does not appear that the company was engaged in the business of factor, nor that there was ever any former dealing between it and the consignor.

We are of the opinion that the Court below rightly gave the plaintiff judgment for a return of the property, or its value. Plaintiff did not confer upon the California Type Foundry Company such an apparent title to, or power of disposition over it as will estop it from asserting its own title as against the pledgees. Passing the question whether the *mere possession* of property under written instructions showing that the possessor has no title, would be sufficient evidence of ownership to protect a pledgee who advances his money on the bare statement of the possessor that he is the owner, in *this case* the California Type Foundry Company was not in the actual possession of the property at the time the loan in question was negotiated. The property was then in the warehouse of the railroad company; and as is correctly said for the respondent, its possession by the railroad company was not evidence of title in the California Type Foundry Company. The latter had no bill of lading or invoice—nothing to evidence any title in it. But it did have the letter of instructions, from which Forbes Brothers must have seen that the plaintiff was the owner of the property, had they required some evidence of title in the proposed pledgor, as they ought to have done.

Order affirmed.

[No. 7,787.—In Bank.]

May 28, 1882.

P. REDDY v. Z. B. TINKUM.

TERRITORIAL JURISDICTION OF THE STATE—COUNTY GOVERNMENTS—MONO COUNTY WARRANTS.—By an Act of the Legislature passed in 1861 for the creation of the County of Mono, the eastern boundary of the State was made the eastern boundary of the County and it was provided, that the seat of justice should be at Aurora; but upon the definite location of the State boundary line under legislative authority it was ascertained

that Aurora was within the then Territory of Nevada, and thereupon, (in year 1864) an Act was passed establishing the County seat at Bridgeport, a point west of the State line. By the former Act an election of County officers was provided for, and seven persons were named, (all of them residents of Nevada Territory), to constitute a Board of Commissioners to designate the election precincts in the County, canvass the returns and issue certificates of the election and officers were accordingly elected and qualified and assumed to perform official functions. In an application for a writ of mandamus to the Treasurer of the County of Mono to compel him to pay certain warrants drawn by the Auditor thus elected in the years 1862 and 1863, endorsed "presented and not paid for want of funds" by the person then assuming to act as County Treasurer, the Court below denied the writ.

Held: The writ was properly denied. Neither the warrants nor the claims upon which they are based form any basis for a legal demand against the County as now organized. The action of the Legislature in naming Aurora as the seat of justice, and in naming persons as officers who are non-residents of the State whether regarded as a mistake, or as an intended assertion of jurisdiction, was in excess of its authority.

Id.—*Id.*—The legislative authority of every State must spend its force within the territorial limits of the State; it has no extra-territorial jurisdiction.

APPEAL from a judgment for the defendant and from an order denying a new trial in the Superior Court of Mono County. WIGGIN, J.

P. Reddy, in propria persona, for Appellant.

The evidence was insufficient to justify the second finding of the Court, to the effect that R. M. Wilson was not the legally elected or qualified County Auditor of Mono County, and that William Feast was not the legally elected or qualified Treasurer. The testimony of Z. B. Tinkum and that of J. G. McClinton show that they were officers *de facto* and *de jure*. (C. C. P. § 1963, sub. 14; *Cohas v. Raisin*, 3 Cal. 453; *The People v. David Clingan*, 5 id. 389; *The People v. Roberts*, 6 id. 214; *Mott v. Smith*, 16 id. 535.)

The judicial department cannot interfere with or revise the acts of the political power of the State. (*Nouques v. Douglass*, 7 Cal. 65; *Napa Valley R. R. Co. v. Napa Co.*, 30 id. 435.) From the time of the organization of the State up to the fourth of April, 1864, the State of California had claimed up to a line a considerable distance to the eastward of the town of Aurora, and had claimed, and actually exercised, jurisdiction up to that line. It will be observed that the Acts of

1863 and 1864 respecting the eastern boundary line are not retroactive. The purpose of that Act was to settle disputes about the boundary line, and jurisdiction in the future. (*Poole v. Fleegeer*, 11 Peters, 209.)

The Courts of a State are bound by the claim and exercise of jurisdiction *de facto* of their own government, because the question of State boundaries is purely a political one, so far as State Courts are concerned. (Best on Ev., vol. 1, § 253; Greenl. on Ev. 11th ed. vol. 1, § 6; *Bedell v. Loomis*, 11 N. H. 9; *State v. Dunwell*, 3 R. I. 127; *Vanderwerker v. The People*, 5 Wend. 530; *People v. Smith*, 1 Cal. 9; *Foster v. Neilson*, 2 Pet. 253; *Williams v. Suffolk Ins. Co.*, 3 Sumn. 270; *United States v. Arredondo*, 6 Pet. 710; *Poole v. Fleegeer*, 11 id. 185; *Massachusetts v. Rhode Island*, 11 id. 657; *Garcia v. Lee*, 12 id. 511; *Williams v. Suffolk Ins. Co.*, 13 id. 419, 420; *Luther v. Borden*, 7 How. 1.)

In case of a dispute with an adjoining State, the Legislature is to act for the State in adjusting such dispute.

The contending States may, with the consent of Congress, establish by agreement a boundary, although not the true line; or the question may be referred to the Supreme Court of the United States, which is the only Court authorized to take cognizance of such a question, and to judicially determine the same. (*Rhode Island v. Massachusetts*, 12 Peters, 657.)

The 9th Section of the Act of 1863 provided that notice should be given to the Governor of the Territory of Nevada, and that he be requested to appoint a person or persons to act in conjunction with the Surveyor General of this State in the establishment of said lines, so that the line established by that survey was by agreement and by the joint action of the two governments.

They had the right to establish a boundary line by agreement, no matter whether it was the true line or not.

The consent of Congress had already been obtained, as will be seen by reference to the Organic Act of the Territory of Nevada. (12 United States Statutes at Large, 209.)

It does not follow that the line established under the Acts of 1863 and 1864 is the line mentioned in our Constitution, but nevertheless it has been binding and conclusive upon the

Courts, all corporations, and citizens of this State, as the legal boundary from the time it was established. (*Poole v. Fleezer*, 11 Peters, 209.)

The boundaries of Rhode Island were designated in the Charter of 1663. Notwithstanding the fact that the lines were so designated in the Charter, the Rhode Island Court held that it was bound by the claim *de facto* of jurisdiction by the political department of the State. (*State v. Dunnell*, 3 R. I. 127; *Bedell v. Loomis*, 11 N. H. 9; *Rhode Island v. Massachusetts*, 4 How. 591.)

While such a question is pending, there must be some power in the State, and that must be the political power, to assert the rights of the State to its territory, and to contend for the establishment of the boundaries upon what the political power deems to be the true and proper line. Otherwise, before the marking of the boundaries the State might be invaded upon all sides by its neighbors.

The claim of the State, prior to the Act of 1864, followed by actual exercise of jurisdiction, was not unconstitutional, and was made in conformity with the power conferred upon the legislature by the Constitution of the State.

And its claim to jurisdiction over the territory upon which the town of Aurora is situated, was just as valid, and was as binding upon the Courts of the State, as is its claim of jurisdiction over the territory now within the line established in 1864.

The Acts of 1863 and 1864 operated simply as a change of boundary. Whether that change was made in consequence of a cession of territory to Nevada, or with a view to compromise the dispute existing between the two governments, makes no difference whatever.

It is plain that the Courts of the county, which were held at Aurora during the years 1861, 1862, and 1863, would have exceeded their powers, had they determined that the town of Aurora was not in the State of California; and that it would have been an act of suicide to make such a decision. Is it not equally suicidal for the Court of Mono County, at the present day, to make such a decree? What is there in the Acts of 1863 and 1864 to warrant the Court in such a deter-

mination? Those Acts did not pretend to affect the past claims of the State.

It cannot be pretended that California intended to declare, by those Acts, that its former claim was false or unfounded, or that it had invaded the Territory of Nevada. The State or county government cannot cast the burden of its own mistakes as to boundaries upon the citizen.

The citizen can only learn the boundaries of the State by reference to the Acts of the legislature. Mono County was created under the Act of 1861. All of its powers and liabilities are regulated by legislative enactment. It is the creature of the statute; it cannot deny its own existence where the statute affirms it.

It can not disincorporate or dissolve itself. It can not deny possession of a power conferred. It can not alter or fix its own boundaries, nor can it enter into a dispute with its creator, respecting the boundaries of the State. It is not possessed of sovereign power, and can not engage in disputes between sovereign States. When the legislature designated the county seat, the county had no power to say that that was not the county seat of the county. It can not fix the date of its creation so as to suit itself, and to cheat its creditors. It can not claim an existence, as it did, for the purpose of collecting revenue, accepting services and value from individuals, and then deny its existence, at that time, for the purpose of evading its debts.

The governmental powers which it exercised were conferred upon it by the State; and it can not be permitted to claim and exercise such functions, and yet deny the power of the State to grant them.

If the State of California, by mistake, was possessed of, and exercised jurisdiction over, the territory east of the State line as described in the Constitution of the State, it was a government *de facto* over said territory, and the County of Mono was one of the agencies adopted by the State for governing that section of country. The State would not repudiate any of its contracts made for carrying on such government; and the county can not. (*Dimwiddie County v. Stuart, Buchanan & Co.*, 28 Grat. 536; *Texas v. White*, 7 Wall. 702.)

T. W. W. Davies, for Respondent.

As matter of affirmative defense, we submit, that by the evidence there was no legal organization of the County of Mono during the years 1862 and 1863, when these warrants were drawn, nor until late in the year 1864, after the county seat was established at Bridgeport, and the county officers elected at the special election in June, 1864, qualified and entered upon the discharge of their duties. And, as there was no legally organized county government, as a consequence, there was no power to bind the county vested in the pretended officials. During the years 1861, 1862 and 1863 there was no county seat of Mono County.

California was limited by the eastern boundary line as so fixed and defined, and the territory east of that line was the property and under the exclusive jurisdiction of the Government of the United States of America.

So much of the Act organizing Mono County, 1861, as regards making Aurora the county seat was void, being in excess of the powers of the Legislature. (Cooley on Con. Lim. 127, 128.)

In Story on Conflict of Laws, Sec. 7, Judge Story says: "It is plain that the laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country. They can bind only its own subjects, and others who are within its jurisdictional limits; and the latter only while they remain therein. No other nation, or its subjects, are bound to yield the slightest obedience to those laws." And in the same section he quotes from Boullenois (1 Boullenois, *Principes Generaux*, 6, p. 4.): "Of strict right, all the laws made by a sovereign have no force or authority, except within the limits of his dominions." (Story on Conflict of Laws, Secs. 7, 8, 19, 20, 22, and 539, fifth edition; *Blanchard v. Russell*, 13 Mass. 4; S. C., 7 Am. Dec. 106; *United States v. Bevans*, 3 Wheat. 386; *Miller v. Ewer*, 27 Maine, 517; 6 Johns. Ch. 357; 2 Kent's Com. 3d. ed. 457; *Collins v. State*, 30 Amer. Rep. 142; Henry on Foreign Law, 1; *People v. New Jersey Central R. R. Co.* 42 New York, 283; *United States v. Owens*, 2 Peters, 540; *Bank v. Donnelly*, 8 id. 372; *Rhode Island v. Mass.*, 12 id. 736; *Bank of Augusta v. Earle*, 13 id. 588.

There were no legally elected and qualified county officers in Mono County during the years 1861, 1862, and 1863.

Each member of this commission was a non-resident alien, residing in the Territory of Nevada, and all of their official acts as to said election were done without the State of California, and at Aurora, Nevada Territory.

The R. M. Wilson, who assumed to act as Auditor in the issuing of the alleged warrants, and the William Feast, who assumed to act as Treasurer in indorsing said warrants, were non-resident aliens, not qualified electors of the State of California, and ineligible to office in this State.

And the same is true of two members of the pretended Board of Supervisors, Schultz and Green, being a majority of said Board. (Cons. Art. ii, § i; *Searcy v. Grow*, 15 Cal. 121; Wood's Dig., 693, Art. 3314, 3315; *Bourland v. Hildreth*, 26 Cal. 161.)

In view of the foregoing, it is submitted that during the years 1862 and 1863, when these alleged warrants were issued, there was no Mono County, and consequently no power to bind the county. (*Clark v. Robinson*, 88 Ill. 511; *People v. Morrell*, 21 Wend. 563; *State v. Walker*, 17 Ohio, 135; *Buckinghouse v. Gregg*, 19 Ind. 401; *People v. McGuire*, 32 Cal. 143; *People ex rel. Tracy v. Britz*, 55 id. 79.)

MYRICK, J.:

This is a proceeding for a writ of mandate directing the respondent, County Treasurer of Mono County, to pay to petitioner the amounts of certain warrants set forth in the petition. The warrants bear date respectively various days from February 8, 1862, to December 14, 1863, and are signed "R. M. Wilson, County Auditor," and indorsed, "Presented and not paid for want of funds. Wm. Feast, County Treasurer." The Court below found that said Wilson was not County Auditor of Mono County; that said Feast was not County Treasurer; that the alleged warrants were not drawn by any officer authorized to draw the same, nor presented to any officer authorized to register the same; that the claims for which the warrants were drawn were never examined, settled, allowed, and ordered paid by the Board of Supervisors of Mono County; that the acts of said Wilson, purporting and

pretending to be County Auditor, and of said Feast, purporting and pretending to be County Treasurer, relative to said warrants were done and performed at Aurora, in the County of Esmeralda, in the then Territory, now State of Nevada; that the acts of the persons purporting and pretending to compose the Board of Supervisors, relative to the examination and allowance of the claims on which the warrants were drawn, were done and performed at said Aurora; that said Wilson and Feast, and a majority of the pretended Board of Supervisors, were non-residents of the State of California and were residents of said Territory of Nevada: and thereupon the Court rendered judgment for respondent, Tinkum. The petitioner appealed from such judgment and from the order denying his motion for a new trial.

In 1861 the Legislature of this State passed an Act for the creation and organization of the County of Mono. (Stats. 1861, 235.) In the Act the boundaries are defined, and the eastern line of the State is made the eastern line of the proposed county. The second section reads: "The seat of justice of Mono County shall be at Aurora." An election of county officers was provided for, and seven persons were named to constitute a Board of Commissioners, to designate the election precincts in the county, canvass the returns and issue certificates of election. The meetings of the Board were to be held at Aurora. We may presume that the Legislature, in passing this Act, supposed that Aurora was within the State of California and within the boundaries of the proposed county; such, however, was not the fact. In 1863 the eastern boundary line of the State was definitely run and established, under legislative authority, and it was then ascertained that Aurora was within the then Territory of Nevada. At the first session of the Legislature thereafter, to wit, in 1864, an Act was passed establishing the county seat at Bridgeport, a point west of the State line. From and after the passage of the Act of 1861, and during the years 1861 1862, and 1863, a form of county government was entered upon and kept up; elections were held, and persons assumed to perform official functions. The persons named in the Act of 1861 as a Board of Election Commissioners resided in said

Territory of Nevada, as did many of the persons performing functions as county officers, and all the business of the county was transacted at Aurora. The foundation of the warrants in suit was the business thus transacted, viz., seventeen of the warrants were for salary and expenses of said Wilson as Auditor, sixteen were for jury fees, and others were for compensation as Supervisor, District Attorney and the like. At the time of these transactions, Territorial Courts were being held at Aurora, and Territorial elections were had. Aurora was the established county seat of Esmeralda County, Nevada. It appears that at some elections electors were voting at Aurora for Territorial officers, and at others for officers for Mono County. It may be added that at the elections held for Mono County a majority of the votes cast were cast at Aurora. How the comparison existed as to Esmeralda County we are not informed.

We think that the action of the Court below was proper, as well in regard to the findings of fact, as to the conclusions of law and judgment. We think that neither the warrants nor the claims upon which they are based, form any basis for a legal demand against the county as now organized.

First—It is claimed by petitioner that from the organization of the State until April 4, 1864, the State had claimed to a line a considerable distance east of Aurora, and had actually exercised jurisdiction to that line; and that the Courts of a State are bound by the claim and exercise of jurisdiction *de facto* of their own government, because the question of State boundary is purely a political one, so far as State Courts are concerned. Even granting, which we do not, the correctness of that position, to the extent claimed, we are not advised by the Act of 1861, that the State claimed jurisdiction to any point or line east of the boundary line; the Act expressly bounded the new county by the eastern boundary line of the State, without other naming of any tangible object or point; it manifested no intent to go beyond the line of the State; the most that can be said, in that regard, is, that the Legislature erroneously supposed that Aurora was within the State. The Act said: "The seat of justice of Mono County shall be at Aurora," and that is the only reference to any point beyond the line of the State. As soon

as the error was ascertained, the State at once took appropriate action, and established a county seat within the State and county. The naming of Aurora as the seat of justice was clearly a mistake; and we are not prepared to say that a mistake can be raised to the dignity of a political assertion.

Second—Even if there had been no mistake, the action of the Legislature in naming Aurora as the seat of justice, and in naming persons as officers who were non-residents of the State, was in excess of its authority. As well might the Legislature, in creating the county, say of Sacramento, and defining its boundaries, have said, the seat of justice shall be at Deming or Omaha; and as well might it have enacted that citizens of Tennessee or Ohio should district the county into election precincts, canvass the returns of elections and certify the results.

“The legislative authority of every state must spend its force within the territorial limits of the State.” It has no extra-territorial jurisdiction. (Cooley on Const. Lim., 127–8; Story on Const. Law, Secs. 7, 8, 20.)

It is true that the creation of counties and establishing their boundaries, is the exercise of a political function, but the exercise of that function must be within the scope of the power exercising it.

Judgment affirmed.

MORRISON, C. J., concurred.

THORNTON and MCKINSTRY, JJ., concurred in the judgment.

[No. 6,844.—In Bank.]

May 26, 1882.

**AUGUST SCHROEDER ET AL. v. SCHWEIZER LLOYD
TRANSPORT VERSICHERUNGS GESELLSCHAFT.**

MARINE INSURANCE—CHANGE OF SHIP—TRANSHIPMENT OF CARGO.—It is an implied condition of a policy of marine insurance that the ship named in it shall not, after the commencement of the risk, be changed without necessity or the consent of the underwriters; for such unnecessary or unsanctioned change of the ship would produce an alteration of the risk run by the underwriters, and therefore exempt them from their liability.

ID.—ID.—ID.—CONNECTIONS.—Plaintiff's wheat was insured by the defendant on the steamer *Colorado* and *connections*. The customs and usage of the steamship company, with reference to cargoes to Hong Kong and Batavia, was for the ship taking the cargo at San Francisco to carry the same to Hong Kong without transshipment; but in this case the cargo was transhipped in Yokahama (without necessity,) to other ships of the Company, and by them carried to Hong Kong where it was lost.

Held: The "*connections*" referred to in the policy were the regular connections of the company only, and the term was not intended to include a casual, unusual and unanticipated connection with a ship substituted for the occasion upon a state of things temporary in its nature, and unknown at the time that the contract was made. The loss at Hongkong occurred subsequent to the change of ship, and under the terms of the policy the defendant was not responsible.

APPEAL—REVERSAL OF JUDGMENT—NEW TRIAL—PRACTICE.—Extreme caution ought to be exercised in refusing new trials where judgments are reversed. The discretion of the appellate Court should be exercised in that direction only in cases where it is plain, either from the pleadings or from the nature of the controversy, that the party against whom the reversal is pronounced cannot prevail in the suit.

Held, accordingly in this case (THORNTON, J., dissenting), that the cause should be remanded for a new trial.

APPEAL from a judgment for the plaintiffs and from an order denying a new trial.

Milton Andros and Charles Page, for Appellant.

The general rule is, that the right to tranship cargo from the original vessel does not exist, except in case of some accident to that vessel which renders her innavigable, or with the consent of the shipper, or, in case it is insured, with that of the underwriter. (1 Arnold on Ins. 331; Lees' Laws of Shipp. and Ins. 412.) The rule as above stated is recognized not only in the earliest laws of the sea, but has continued to be down to the present time. (Emerigon on Ins. 339; Ordonnance de la Marine, Liv. III, Tit. 6, § 27; Marshall on Ins., Book 1, Chap. 7, § 3; Chap. 11, § 2; 2 Parsons on Ins. 2; Park on Ins. 611; 1 Phillips on Ins. § 983; Hildyard on Ins. 139; *Pierce v. Columbian Ins. Co.* 14 Allen, 320; *Bold v. Rotheram*, 8 Ad. & El. N. S. 797; *Paddock v. Commercial Insurance Co.*, 2 Allen, 93-100; *Trott et al v. Wood*, 1 Gallison, 442.)

It is from the use of the word "*connections*" only, that such consent if given, is to be implied. This word, when construed in connection with the usage stated in the tenth

finding, as it must be, raises no implication of such consent, but, on the contrary, negatives the proposition that the underwriter consented to or contemplated a transshipment at Yokohama.

The word "connections" is general and indeterminate, and its meaning may be explained by the known usage of the Pacific Mail Steamship Company, with reference to the usual and customary course pursued by its line of steamers plying between San Francisco and Hong Kong, and carrying cargo destined to that port or Batavia. (1 Duer on Ins., 195, § 42; *Coit v. Commercial Ins. Co.*, 7 Johns. 385; S. C., 7 Am. Dec. 282; *Houghton v. Gilbert*, 7 C. & P. 701; 1 Phil. on Ins., § 137 *et seq.*; *Astor et al. v. Union Ins. Co.*, 7 Cow. 202; *Dow v. Whetten*, 8 Wend. 160; 1 Park on Ins. 89; 2 Phil. on Ev. (Cow. & Hill's Notes), 724; *Brough v. Whitmore*, 4 Term R. 210; *Pelly v. Royal Exchange Ins. Co.*, 1 Burrow, 345; 1 Duer on Ins., 276, §§ 69, 70; *id.* 195, 196, §§ 42, 49, 44 *et seq.*; *Crosby v. Fitch*, 12 Conn. 422; 3 Addison on Cont., § 1158; 2 Parsons on Cont., 356, 535; 2 Phillips on Ev. 787, 788; *Preston v. Greenwood*, 4 Doug. 28, 32; 1 Park on Ins., 48, 49; *Clark v. United F. and M. Ins. Co.*, 7 Mass. 365, 369; S. C., 5 Am. Dec. 50; *Loring v. Neptune Ins. Co.*, 20 Pick. 411, 414; 1 Duer on Ins. 179, § 31; 184, § 34; *Consequa v. Willings*, 1 Pet. C. C. 225, 229, 230; Abbott's Trial Evidence, 485; 2 Duer on Ins., 668, 669, § 17: 6; *Lowry v. Russell*, 8 Pick. 360, 362; *Van Santvoord v. St. John*, 6 Hill, 157; *F. and M. Bank v. Champ. Trans. Co.*, 18 Vt. 131, 140; *Barksdale v. Brown et al.*, 1 Nott & McC. 517, 519; S. C., 9 Am. Dec. 720; *Vallance v. Dewar*, 1 Campb. 505, 506; Civil Code of Cal., §§ 1566, 1646, 1649; *Wadsworth v. Pac. Ins. Co.* 4 Wend. 34.)

Sidney V. Smith & Son, for Respondents.

A policy of marine insurance protects the insured property from loss by a peril insured against during the whole transit, on the land as well as upon the sea. (*Pelly v. Royal Exchange Assurance Co.*, 1 Burr, 341; *Boehm v. Combe*, 2 M. & S. 172; *Brough v. Whitmore*, 4 T. R. 206; *Coggeshall v. Ins. Co.*, 3 Wend. 283; *Devaux v. J. Anson*, 5 Bingh. N. C. 519; *Fletcher v. Ins. Co.*, 18 Mo. 193; *Dunlap v. Allen*, 9 Faculty Decisions, 371; *Underwriters' Agency v. Sutherlin*, 55 Geo. 266.)

The transshipment at Yokohama was provided for by the broad language of the policy, the words "connections" in its natural import including all transshipments, wherever made. (C. C. P. § 1861.) The principles of law in regard to deviation and change of risk have no application to this case. The language of the policy includes all connections of the *Colorado*, even one which might be a departure from the usage of the steamship company. Proof of that usage could, therefore, affect the express stipulations of the contract. (1 Arn. Ins., §§ 44, 45; 1 Phil. Ins. § 980; C. C. P. § 1870, par. 12; *The Schooner Reeside*, 2 Sumn. 567; *Blackett v. Assurance Co.*, 2 Cr. & J. 244.) There is nothing in the case to show that the usage of the steamship company was known to the community or understood by the plaintiffs; but proof of this sort is necessary to establish a usage which shall be taken to have been a part of the contract. (1 Arn. Ins., § 43; 1 Phil. Ins., § 135; 2 Pars. Mar. Law, 57.) The understanding of the insurer as to the point where the first transshipment would be usually or probably made can not qualify the terms of the policy. (*New York Fire Ins. Co. v. Roberts*, 4 Duer. 141; *Armett v. Innes*, 4 J. B. Moore, 150; *Hunter v. Leathley*, 10 B. & C. 858.)

The language of the policy, being unambiguous, can not be controlled by proof *aliunde* of its meaning. The explicit word "connections" is not open to explanation. (1 Arn. Ins., § 137, p. 361.) All doubt as to the meaning of the words "perils of the sea" or "connections," and as to the construction of the limitation of the insurer's liability to total loss only, is to be resolved in favor of the insured and against the insurer. (1 Duer on Ins., 161; *Wilkins v. Ins. Co.*, 30 Ohio St. 317; *Palmer v. Ins. Co.*, 1 Sto. 360; *Hoffman v. Ins. Co.*, 32 N. Y. 413; *Ins. Co.'s v. Wright*, 1 Wall. 468; C. C. § 1654.)

Sidney V. Smith & Son, for Respondents. (Rehearing in Bank.)

Department No. 2 ordered judgment to be entered in favor of defendant.

We think that under the circumstances of the case more complete justice would be done by granting a new trial, and the propriety of granting a new trial is the only point which we desire to present by this petition.

That the granting of a new trial upon the reversal of a judgment is within the discretion of this Court, follows from the language of Section 53 of the Code of Civil Procedure. (*Argenti v. San Francisco*, 30 Cal. 463; *Ryan v. Tomlinson*, 39 id. 464).

In New York, under a statute similar to our own above cited, it has been held that the granting of a new trial upon reversal was discretionary with the appellate Court, and that to order the new trial was a better exercise of discretion than to order judgment to be entered against the winning party in the Court below. (*Griffin v. Marquardt*, 17 N. Y. 28; *Corning v. Troy Iron and Nail Factory*, 34 Barb. 485; *Burkhardt v. McClellan*, 1 Abb. App. Dec. 266; *Foot v. Aetna Life Ins Co.*, 61 N. Y. 577; *Enrichs v. DeMill*, 75 id. 374; *Edmonston v. McLoud*, 16 id. 543; *Guernsey v. Miller*, 80 id. 183.)

Ross, J.:

The opinion delivered by Department Two in this case is here approved and adopted, but we think that instead of directing judgment to be entered for the defendant on the findings, the cause should be remanded for a new trial.

The power so to do is expressly conferred on the Court by Section 53 of the Code of Civil Procedure, which declares: "The Supreme Court may affirm, reverse or modify any judgment or order appealed from, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had." * * * (See also *Argenti v. The City and County of San Francisco*, 30 Cal. 463; *Pollard v. Putnam*, 54 id. 630.)

Of course this power must be exercised in a proper case; and the appellant here contends, as was contended in *Enrichs v. DeMill*, 75 N. Y. 375, that as the findings of fact were not excepted to, they are to be taken as absolutely true, and as assented to by both parties. But to this we answer, as did the Court of Appeals of New York, in the case cited, that it must be remembered that the plaintiff obtained judgment in the trial court upon the findings as they stood, and was not called upon to except to them, or to insert the evidence in the case to show that they were controverted. And we also agree with

the same Court, where it says, in another case—*Griffin v. Marguardt*, 17 N. Y. 28—"that extreme caution ought to be exercised in refusing new trials where judgments are reversed. The discretion of the appellate Court should be exercised in that direction only in cases where it is plain either from the pleadings or from the nature of the controversy, that the party against whom the reversal is pronounced, cannot prevail in the suit."

In the present case, the counsel for the respondent asserts that when the findings were settled they objected to the finding in respect to the custom and usage of the Pacific Mail Steamship Company with reference to the voyages of their steamships between San Francisco and Hong Kong, and that if judgment had been against the plaintiff, they would have impeached it by bill of exceptions, bringing up the evidence. As that usage and custom is an important fact in the case, we are of the opinion that the cause ought to be remanded for a new trial.

Judgment reversed and cause remanded for a new trial.

MORRISON, C. J., and MCKEE, MYRICK, and SHARPSTEIN, JJ., concurred.

THORNTON, J., dissenting:

I dissent as to the reversal of the judgment. The case cited from N. Y. has no application. The case of *Gay v. Moss*, 34 Cal. 135, is substantially overruled by the judgment here. I adhere to the opinion drawn up by me when the case was before Department Two.

The following is the decision of Department Two referred to:

THORNTON, J.:

This is an action on a policy of insurance to recover for a loss of three thousand nine hundred and fifty-one sacks of wheat, shipped by the plaintiffs with other wheat in sacks at San Francisco, and destined for Batavia.

The cause was tried by the Court, judgment was rendered for the plaintiffs, from which defendant appealed.

All the facts appear in the decision of the Court below, which was as follows:

"The above entitled action came on to be tried by the Court, a jury having been expressly waived by the parties on the twenty-third day of July, 1879, and now the Court, having considered the pleadings and the evidence, finds the following to be all the facts of the case :

"1. On the twelfth day of August, 1874, the defendant, a corporation, issued and delivered to one J. W. H. Campbell, on behalf of the plaintiffs, who were then and are now doing business under the firm name of Busing, Schroeder & Co., the the policy of insurance, a copy of which is attached to the complaint.

"2. Subsequently, before the commencement of this action, said policy was assigned and transferred to plaintiffs, who at the commencement of this action were, and are now, the legal owners and holders thereof.

"3. On said day plaintiffs shipped on board the steamship *Colorado*, then in the harbor of San Francisco, and belonging to the Pacific Mail Steamship Company, the four thousand five hundred and fifty-one sacks of wheat mentioned in said policy, and which were during all the times mentioned herein, the property of, and owned by, the plaintiffs.

"4. The *Colorado* then proceeded to Yokohama, where the master of said steamship received instructions from said company to return to San Francisco, instead of going on to Hong Kong. The reason of these instructions was that the steamer *Alaska*, which should have sailed prior to that time from Hong Kong to San Francisco, was undergoing repairs at Hong Kong, and was unable to make the voyage and to carry the mails between said ports in the regular course of the business of said company. The agents of said company at Yokohama thereupon transhipped the said four thousand five hundred and fifty-one sacks of wheat from the *Colorado* into the steamships *Sierra Nevada* and *Costa Rica*, belonging to the company, by which steamships it was conveyed to Hong Kong.

"5. Six hundred of said sacks of wheat were thus placed on board the *Sierra Nevada*, and were by her and connecting steamers safely conveyed to Batavia.

"6. Three thousand nine hundred and fifty-one of said sacks of wheat, of the value of thirteen thousand eight hundred and eighty-seven dollars, were thus placed upon the *Costa*

Rica and were by her transported to Hong Kong, where they were received by the agents and servants of the said company and by them, as a matter of necessity, and in accordance with the established custom prevailing at Hong Kong, which was known to the defendants at the time of the issuance of the policy, placed and stored in a warehouse on the harbor front of Hong Kong, there to await the first opportunity to ship them to Batavia.

"7. While said three thousand nine hundred and fifty-one sacks of wheat were in said warehouse awaiting reshipment, and before any opportunity to ship them to Batavia had arrived, the said harbor of Hong Kong was visited by a typhoon, or storm of extraordinary violence, which drove the waters of the harbor up on to the land, so that they broke in the roof and windows of the said warehouse, drenched the said wheat with sea water, and flooded the interior of the warehouse to the depth of three or four feet.

"8. By reason of said flooding and drenching, the said three thousand nine hundred and fifty-one sacks of wheat were so thoroughly soaked with sea water and rain, that the wheat began at once to sprout, and became swollen and heated to such an extent that it would have been impossible to transport it to Batavia. No vessel would have received it on board, as there would have been danger during the voyage of its ignition from spontaneous combustion; and, if it had been been taken to Batavia, it would have arrived there as manure, and not as wheat.

"9. The said three thousand nine hundred and fifty-one sacks of wheat were thereupon surveyed by the Government surveyors at Hong Kong, and by their advice sold at public sale, for the sum of three thousand five hundred and forty-one dollars and ninety-two cents, on the twenty-second day of September, 1874.

"10. The custom and usage of the Pacific Mail Steamship Company, with reference to the voyages of their steamships between San Francisco and Hong Kong, with cargo laden for Hong Kong or Batavia, was for the vessel on which such cargo was taken at San Francisco, to carry the same to Hong Kong, without transshipping it at Yokohama, at which port they touched or making connection with any other vessel or vessels,

at the last named port for such purpose. This usage had existed, without interruption, since the first day of January, 1867, the time of the establishment of the company's line of steamers between San Francisco and Hong Kong, the only instance of such transshipment being that of the cargo in question. The defendant had knowledge of this custom, and charged a lower rate of premium on the policy sued on, because it expected that no transshipment of the wheat was to be made at Yokohama.

"And from the foregoing facts the Court now finds the following to be its conclusions of law:

"1. The said three thousand nine hundred and fifty-one sacks of wheat were, while in the warehouse at Hong Kong, insured and protected by the policy, from loss or damage by any of the causes enumerated therein.

"2. The said three thousand nine hundred and fifty-one sacks of wheat were totally destroyed.

"3. The cause of the destruction of said three thousand nine hundred and fifty-one sacks of wheat was a peril of the sea.

"4. The transshipment of the wheat from the *Colorado*, at Yokohama, was justified by the circumstances and by the policy and contract of the parties, and did not avoid the policy.

"5. The division of the four thousand five hundred and fifty-one sacks of wheat, and the putting of part of it on one vessel, and part of it on another vessel, were justified by the circumstances, and by the policy and contract of the parties, and did not avoid the policy.

"6. The total destruction of the three thousand nine hundred and fifty-one sacks of wheat was an absolute total loss, and not a partial loss or a particular average within the meaning of the policy.

"7. By the policy, the wheat therein mentioned was not insured only during or upon the usual voyage performed by the steamers appertaining to said company, from San Francisco to Hong Kong, but was insured while it should be upon said *Colorado* or any other steamer with which the *Colorado* might anywhere connect, or to which she might anywhere transfer her cargo.

"8. The 'connections' in said policy of insurance mentioned

was not a connection in the first instance, to be made at the port of Hong Kong, by and between said steamship *Colorado* and some other vessel, but included the connection which was made by the *Colorado* with the *Sierra Nevada* and the *Costa Rica* at Yokohama.

"9. The plaintiffs are entitled to recover from the defendant the said value of the said three thousand nine hundred and fifty-one sacks of wheat, less the amount for which they were sold, with interest thereon at the rate of ten per cent per annum, from the twenty-second day of September, 1874, up to the sixteenth day of April, 1878, and from that date at the rate of seven per cent per annum, amounting in all to the sum of fifteen thousand and seventy-one dollars and forty-one cents."

The policy was made part of the findings of fact by reference to it as attached to the complaint.

The wheat was insured at and from San Francisco to Batavia on board the steamer *Colorado* and *connections*, against perils of the seas, fires, pirates, etc.

As appears in the findings of fact, the wheat was shipped on the *Colorado* in the harbor of San Francisco and it then proceeded to Yokohama, where the ship-owner transhipped the wheat from the *Colorado* to the steamships *Sierra Nevada* and *Costa Rica*, belonging to the same owner, by which it was carried to Hong Kong.

This change was made, not from the fact that the *Colorado* had been in any way disabled or rendered unnavigable, or with the consent of the insurer, but from the fact that when it reached Yokohama the master received instructions from the owner to return to San Francisco instead of going on to Hong Kong (see fourth finding, where the fact is found, and the reason that these instructions were given to the master.)

It is contended that this transshipment was unjustifiable, and its effect was to change the risk, and, in consequence, the defendant insurer was discharged from its contract. If the contract was thus changed the defendant cannot be held liable. "It is an implied condition of the policy that the ship named in it, should not, after the commencement of the risk, be changed without necessity or the consent of the underwriters; for such unnecessary or unsanctioned change of the

ship would produce an alteration of the risk run by the underwriters, and, therefore, exempt them from their liability." (1 Arnould on Ins., 177.) The author cites Emerigon, ch. xii, § 16, vol. 1, 419, 425, ed. of 1827, and *Pothier Traite d'Assurance*, Nos. 68, 69, 70, 71.)

As to insurance on goods, freight, profits, etc., the same author says: "That if either before the commencement of the voyage or during the course of it, the ship named in the policy be changed without necessity, or without the consent of the underwriters, they will be discharged from liability." (1 Arnould on Ins., 178.)

The author then proceeds and gives a reason for the rule:

"So invariable is this rule, that it holds good even though the substituted ship may be of larger dimensions or greater strength than that originally named in the policy, for by the fact that a given ship is named in the instrument, the underwriter has a right to say that he had some peculiar reasons for insuring a risk on that very ship, which should not apply to any other.

"On the same ground, if without consent or necessity, the cargo is either shifted from the ship named in the policy to one as good or better, or is originally loaded on board of the latter instead of on board the ship named, and both ships perish on the voyage, yet the underwriter shall be discharged from all liability, for the policy never attached upon the goods loaded on board the substituted ship." (Id. 178; 2 Pouson's M. Law, 276; *Bold v. Rotheram*, 8 Q. B. 781; *Winthrop v. Union Ins. Co.*, 2 Wash. C. C. 7, 20.)

If, however, the underwriters consent, or if the ship in the course of the voyage becomes so disabled as to be incapable, by any means at the master's disposal of being repaired at all, so as to take on the cargo, the master may procure another ship in which to forward the cargo to its port of destination, and the liability of the underwriters of the goods, will still continue; and they will be liable for any loss occurring subsequent to the transshipment. (Id. 179; See *Plantamour v. Staples*, 1 Term. Rep. 611; Note, S. C. 3 Dougl. 1; *Schieffelin v. N. Y. Ins. Co.* 9 Johns. 21; 1 Phill. Ins., 485-6; *Treadwell v. Union Ins. Co.*, 6 Cowen, 270; *Saltas v. Ocean Ins. Co.*, 12 Johns. 107; S. C., 7 Am. Dec. 290; *Abbott Ship*, 6 Am. ed.

365, Notes; 3 Kent, 5 ed. 257. See also Lee's Law of Shipping and Insurance, 412.)

The necessity which will justify such action on the part of the master, only arises in case the ship is disabled by stress of weather, or other peril of the sea, from carrying on the goods to the place of destination. (Lee's Law of Sh. and Ins., 412; Arnold on Ins., 185; *Shipton v. Thornton*, 9 Ad. and Ellis, 336.)

No such necessity appears in this case. The facts in relation to the transshipment appear in the fourth finding, and they were not sufficient to justify it.

But it is contended that such consent is implied and was given by the use of the word "*connections*" in the policy—the underwriters stipulating for indemnity as regards the steamer *Colorado* and its connections.

If such is the significance of this word, the change of ship is justified. This word is simple and clear in its meaning. It indicates the act of connecting with some means of carriage or forming a junction with such means. (See Webster's and Worcester's Dictionaries, word "connection.")

It is evident that the contract of insurance was entered into with regard to a state of things as to the connections of the ship *Colorado* existing at the time of the execution of the policy. Reference certainly was not made to a casual, unusual and unanticipated connection with a ship substituted for the occasion, upon a state of things temporary in its nature and unknown at the time that the contract was made. It surely was not in the mind of either of the contracting parties that the *Colorado* would be turned back when she reached Yokohama, for the reason that the *Alaska* was disabled from taking its place in the regular course of business of the company (owner), and was then undergoing repairs at Hong Kong. It does not appear, and therefore we can assume it as an established fact, that the parties did not know when the contract was made, those facts concerning the *Alaska*. It further appears from the facts found that the only connections which the *Colorado* had were those at Hong Kong—for it is stated in the tenth finding of facts that the custom and usage of the owner, the Pacific Mail Steamship Company, with reference to the voyages of their steamships between San Francisco

and Hong Kong with cargo laden for Hong Kong or Batavia, was for the vessel on which such cargo was taken at San Francisco, to carry the same to Hong Kong without transshipping it at Yokohama, at which port they touched, or making connection with any other vessel or vessels at the last named port for such purpose, and that this usage had existed without interruption since the first day of January, 1867, the time of the establishment of the company's line of steamers between San Francisco and Hong Kong, the only instance of such transshipment being that of the cargo in question. This in our judgment is enough to show that such were the connections and the only connections existing at the time that the policy was entered into—a connection to be made at Hong Kong.

Why should it be held that such were not the connections referred to in the policy? The word was used as of something then in being. We find something in being fully answering to the word used. The *Colorado* was spoken of in the policy as having connections. It did have connections at Hong Kong as found, and had no connections elsewhere. Why are not these the connections mentioned in the policy, and not any such temporary connection availed of and created on and for the occasion by reason of an exigency which had just occurred, and which neither of the contracting parties was aware of, at the time they entered into the contract of insurance.

Certainly we are justified in holding that the parties contracted with reference to a state of things known, and would not be justified in holding that they contracted with reference to a state of things unknown, unanticipated and temporary in its nature. If they had any intention to contract with reference to a change in the usual course, it might have been easily and clearly expressed in the contract.

But it is said that the plaintiffs had no knowledge of the custom and usage found in the tenth finding of fact. If they did not, it was their own fault. They were in effect told by the use of the word in the policy, that there were connections of the *Colorado*. The use of the word put them on inquiry. If they did not know it, certainly they would have inquired. But surely they knew what they were contracting about.

They were contracting about the connections of the ship *Colorado*, and we think they should not be held to have been ignorant of them. It is not averred in the pleadings that they did not know it. If they did not, it might be claimed that it was a mistake on their part—whether of fact or law, it is unnecessary to say. If a mistake of fact or of law, it might have the effect of releasing them from the obligation of the contract; certainly it could not extend the obligation of the defendant, or create a new one binding it. If the contract was not the contract they entered into, they should have proceeded to have it reformed. Not having done so, it must be construed as it is.

Nor does it make any difference that the words "custom and usage" are used in the finding with regard to this matter. The words used indicate a course of business pursued by the owners of the ship *Colorado* for a series of years and establishing a state of things referred to in the policy of insurance as existing at the time it was signed and delivered. It would not be proper to hold of this that it was a mercantile custom or usage, which did not bind the plaintiffs, because there is no finding that they were aware of it. It signifies a course of business of a particular line of steamships with reference to which a contract was made (1 Greenl. Ev. Section 292; *The Schooner Reeside*, 2 Sumner, 567), referred to in the written contract in such language as to show to men of but little experience in business matters that a course of business in existence was alluded to and meant. To come to any other conclusion would be to hold that the plaintiffs did not know what they were contracting about, a conclusion which nothing appearing in the record indicates, and from which the law withholds any justification.

This course of business had existed from January, 1867, to the time the policy was executed, which was on the twelfth day of August, 1874, more than seven years before the date just mentioned. Under the pleadings, evidence should be received to show the meaning of the word "*connections*," but not to show that the plaintiffs did not know what that meaning was.) 1 Greenl. Ev., § 592, *Schooner Reeside*, *ut supra*.)

The seventh and eighth conclusions of law are not proper deductions from the facts found. We understand them as

conclusions of law—as constructions of the instrument under the facts found, and not as findings of fact. If they were findings of fact they would be inconsistent with other findings, notably the tenth. As conclusions of law, they are not justly deducible from the facts.

The contract was made with reference to a voyage of the *Colorado* to Hongkong, where a connection would be made by a change of ship from that port to Batavia, unless the steamer became disabled and was rendered unnavigable, when a change of ship might have been made at Yokohama. Such change, at the port just named, might also have been properly made with the consent of the underwriters. Neither of these occurred, and therefore the change of ship was not allowable. The risk was changed, and the underwriters might well say *non in haec foedera veni*. Whether the risk was increased or diminished by the change, the result is the same. The terms of the contract do not allow it, nor does the law.

The loss at Hongkong occurred subsequent to the change of ship, and under the terms of the policy, the defendant was not responsible for any such loss occurring after that event. As the result here reached is conclusive, it is unnecessary to consider the other questions which were so ably discussed on the argument.

The judgment should be reversed and the cause remanded to the Superior Court of the City and County of San Francisco, with a direction to enter judgment for the defendant, and it is so ordered.

SHARPSTEIN and MYRICK, JJ., concurred.

[No. 7077.—In Bank.]

May 26, 1882.

THE STOCKTON SAVINGS AND LOAN SOCIETY v.
J. S. DONNELLY ET AL.

FORECLOSURE OF MORTGAGE—ATTORNEY'S FEE.—Action to foreclose a mortgage which provided for payment of an attorney's fee "to become payable on filing the complaint for foreclosure." After the commencement of the suit the defendant paid the principal, interest, and Court costs,
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but not the attorney's fee; but was informed by the plaintiff that there was an attorney's fee due which he would have to pay before the mortgage would be satisfied or the suit dismissed.

Held: The plaintiff was entitled to proceed with the action to enforce the payment of the attorney's fee.

Id.—*Id.*—The cause was tried before a jury which returned a verdict for the plaintiff for one hundred and twenty-one and forty-five one hundredths dollars, on which the Court entered a decree in favor of the plaintiff for the sum mentioned.

Held: It was the province of the Court to fix the amount of the attorney's fee, but as the Court adopted as correct the amount returned by the jury, the amount may be considered as having been fixed by the Court.

APPEAL from a judgment for the plaintiff, and from an order denying a motion for a new trial, in the Fifth District Court of the County of San Joaquin. BOOKER, J.

Byers & Elliott, for Appellants.

The note being paid, no cause of action existed. The attorney fee was no cause of action. The mortgage can not be offered in evidence until the debt, for which it is given to secure, is proven. (*Bennett v. Taylor et al.*, 5 Cal. 502; *Carriere v. Minturn et al.*, 5 id. 436; *Nagle v. Macy*, 9 id. 428; *Henley et al. v. Hotaling et al.*, 41 id. 28; *Patterson v. Donner*, 48 id. 380.)

F. J. Baldwin and *W. L. Dudley*, for Respondents.

The defendant contests the judgment upon the sole ground that he having paid the note which the mortgage was given to secure, such payment operated as an extinguishment of the mortgage, notwithstanding his covenant to pay an attorney's fee, and notwithstanding his express agreement that the suit should not be dismissed nor mortgage satisfied until it was paid.

The cases upon which the appellant relied in the Court below, to wit: *McMillen v. Richards*, 9 Cal. 365; and *Carriere v. Winturn*, 5 id. 435, have no application to the case in hand. The amount, to become due, as an attorney's fee, upon instituting suit to foreclose, was fixed in the mortgage, and became an obligation of the defendant, as much as the note itself, whether the fee be treated as the cause of action, or a mere incident to it, like costs.

Ross, J.:

This action was commenced to foreclose a mortgage given to secure the payment of a promissory note executed by the defendant to the plaintiff. The mortgage contains this clause: "In case default be made in the payment of the said principal, or any installment of interest, as provided, the whole sum of principal and interest shall be due at the option of the said party of the second party, and suit may be immediately brought and a decree be had to sell the said premises, with all and every of the appurtenances, or any part thereof, in the manner prescribed by law, and out of the money arising from such sale, to retain the said principal and interest, although the time for payment of said principal sum may not have expired, together with the costs and charges of making such sale, and of suit for foreclosure, including counsel fees at the rate of seven (7) per cent. upon the amount which may be found to be due for principal and interest, by the said decree (or upon said note and this mortgage, in case the suit is settled before judgment be recovered, to become payable on filing a complaint for foreclosure) and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said party of the first part, his heirs or assigns."

By an Act approved March 27, 1874, the legislature provided that "in all cases of foreclosure of mortgage the attorney's fee shall be fixed by the Court in which the proceedings of foreclosure are had, any stipulation in said mortgage to the contrary notwithstanding." (Stats., 1873-74, p. 707.)

The default of the defendant in the payment of the money due upon the note caused the commencement of the action, and when thus commenced the plaintiff became, under the terms of the mortgage, entitled to a lien on the mortgaged premises as security for the payment of a reasonable attorney's fee. The record shows that some time after the foreclosure suit was brought, the defendant paid the principal, interest, and Court costs, due the plaintiff, but did not pay the attorney's fee incurred by the plaintiff in the prosecution of the action. Respecting that, the transcript shows that at the time the defendant made the payment he was informed by the plaintiff that there was an attorney fee due which de-

fendant would have to pay before the mortgage would be satisfied or the suit dismissed—to which defendant responded, in substance, that he would see the attorney of the plaintiff and arrange the matter with him, as he thought he could do better with the attorney than with the plaintiff. But defendant did not pay the attorney, and his position now is, that as he paid, and the plaintiff accepted, the principal and interest due on the note, together with the Court costs incurred in the action of foreclosure, and the note was surrendered to defendant, the action could not proceed for the enforcement of payment of the plaintiff's attorney's fee. In this position we can not sustain defendant. His default created the necessity for the suit, and on the commencement of the suit the lien arose by the terms of his contract. That lien was never discharged by payment, nor waived nor surrendered.

It appears, from the record, that the cause was tried in the Court below before a jury which returned a verdict for the plaintiff for one hundred and twenty-one dollars and forty-five cents, on which the Court entered a decree in favor of the plaintiff for the sum mentioned, with costs, and directing the property to be sold for its payment. It was the province of the Court to fix the amount of the attorney's fee, and the verdict of the jury was, at most, but advisory. But as the Court adopted as correct the amount returned by the jury, we think the amount may be considered as having been fixed by the Court.

Judgment and order affirmed.

THORNTON and MCKINSTY, JJ., and MORRISON, C. J., concurred.

[No. 6,604—In Bank.]

May 26, 1882.

GEORGE McDONALD v. SUSAN M. McELROY ET AL.

RIGHT OF WAY—LIABILITY OF HEIR ON COVENANT OF ANCESTOR—WARRANTY—QUIET ENJOYMENT—SEISIN—DEED.—The facts alleged in the complaint were in substance as follows: M. by deed of date October 27, 1877, for a valuable consideration conveyed to plaintiff a lot of land in San Francisco "particularly described as follows; Commencing on the south-

easterly line of Minna street at a point distant one hundred and sixty feet eight inches northeasterly from the northeasterly line of Tenth street; thence running northeasterly along said line of Minna street twenty-two feet eight inches; thence at right angles southeasterly eighty feet; thence at right angles southwesterly twenty-two feet eight inches; and thence at right angles northwesterly eighty feet to said southeasterly line of Minna street at the point of commencement; *together with the right of way in, upon and over a street thirty-five feet in width called Minna street, running from Tenth street to the southwesterly line of the lot of land thereby conveyed (to wit, said last described parcel of land); said street forever to be and remain free and open as a public street.*" At the date of the deed, M. was the owner of an undivided sixth part of a tract of land including the strip of land referred to as Minna street from Tenth street to within a short distance of the land conveyed, and was the owner in severalty of a tract of land which included the balance of the strip up to the land conveyed—said strip of land being in fact not a street but private property. After the death of M. by a decree in an action of partition to which the plaintiff was not a party, a portion of the land thus held in common, including a portion of the so called Minna street, was allotted to the defendants herein (who are the widow and children and heirs of M.) and the balance of the said land including the greater part of the so called Minna street was allotted to other parties; and thereby the ingress and egress of the plaintiff over the said Minna street to Tenth street became for the greater part of the way impracticable except with the consent of the owners. Afterwards by a decree of distribution in the Probate Court the tract of land allotted to the defendants herein in the partition suit, and also the tract owned by M. in severalty extending from the land conveyed northerly to Mission street were distributed to the defendants. The plaintiff requested the defendants to open Minna street as in said deed described or otherwise to afford plaintiff means of ingress and egress to and from his said land, and they refused to do so. The prayer of the complaint was for specific performance and for general relief. Judgment went for the defendants on demurrer to the complaint.

Held: The words "street forever to be and remain free and open as a public street"—if they constitute any covenant, are either a covenant of seisin or a covenant of warranty, or for quiet enjoyment. If construed as a covenant of seisin, there was a breach as soon as the covenant was executed, and the plaintiff claim for the breach should have been presented to the administratrix of the estate of M.; if a covenant of warranty or for quiet enjoyment, the heirs are not bound, as they are not named in the covenant, and the breach occurred after the death of the covenantor.

Id.—Id.—Id.—Id.—Id.—Id.—At common law, to make the heir responsible, it was essential that he be expressly named in the bond or covenant of his ancestor; and in this State there was no statute which made the lands descended to the heir liable for the covenants of the ancestors, except the statute which applied all assets to the payment of decedent's debts—through the machinery of the Probate Court.

Id.—*RIGHT OF WAY OF NECESSITY.*—*Held,* further that plaintiff is not entitled to a right of way of necessity over defendant's lands.

Id.—Id.—*CASE DISTINGUISHED.*—*Taylor v. Warnaky*, 55 Cal. 350, has no application to this case.

APPEAL from a judgment for defendants in the Nineteenth District Court, City and County of San Francisco. WHEELER, J:

Besides the allegations referred to in the opinion, the complaint alleged that, at the time of the conveyance to the plaintiff and from thence up to the time of his death, McElroy owned in severalty a tract of land lying between the parcels sold and conveyed to the plaintiff and the larger tract fronting on Mission and Tenth streets in which he had an undivided interest, which parcel so owned in severalty extended north-erly from the land conveyed to Mission street; and that this land was distributed to the defendants by the Probate Court.

The Court in granting the petition for hearing in bank made the following order:

"Ordered that petition for hearing in bank be granted.

"The attention of the counsel is called to the questions:

"1. Is plaintiff (uuder his allegations) entitled to a way of necessity?

"2. Is the language of the deed set forth in the complaint (relating to Minna street) a covenant?

"3. If so, is it a covenant running with the land, and so binding upon the heirs although they are not named in it?"

McAllister & Bergin, for Appellant.

That the provision in the deed constitutes a covenant, see: *Aikin v. Albany & Vt. R. R.*, 26 Barb. 292; *Van Rensselaer v. Smith*, 27 id. 146; *Masury v. Southworth*, 9 Ohio St. 353.

The provision in the deed with respect to Minna street constituted a covenant for that street. (*Bartlett v. Bangor*, 67 Me. 460; *Thomas v. Poole*, 7 Gray, 84; *Zearing v. Raber*, 74 Ill. 409; *Brown v. Manning*, 6 Ohio, 298; S. C., 27 Am. Dec. 253; *Stone v. Brooks*, 35 Cal. 499; *Brew v. Van Deman*, 6 Heisk, 434; *Trustees of Watertown v. Cowen*, 4 Paige, 510; S. C., 27 Am. Dec. 80; *Barrows v. Richard*, 8 Id. 351; *Tallmadge v. East River Bank*, 26 N. Y. 109; *Trustees v. Lynch*, 70 Id. 447; *Atlantic Dock Co. v. Leavitt*, 54 Id. 38.) As to what covenants run with the land: *Masury v. Southworth*, 9 Ohio St. 349; *Hunt v. Danforth*, 2 Curtis C. C. 592.

The heirs of McElroy are liable upon the covenants of the

deed to the extent of the assets descended to them. (*Metcalf v. Smith*, 40 Mo. 576; *Watkins v. Holman*, 16 Pet. 62, 63; *Piatt v. St. Clair's Heirs*, 6 Ohio, 242; 4 Kent, 240 (marg.); *Williams v. Gibbes*, 17 How. (U. S.) 257; *In the Matter of Howard*, 9 Wall. 186.) The death of McElroy did not destroy the obligation of the covenant or create a breach thereof. Until there was a disturbance in enjoyment of the street there was no right of action, no claim could be presented against his estate therefor. The eviction occurred only a few months before the commencement of this action. (*McGary v. Hastings*, 39 Cal. 360.)

Limitation commences not from the making, but from the breach of a contract. (*Baker v. Joseph*, 16 Cal. 177.) In this case, if upon no other principle, we respectfully submit that the plaintiffs are entitled to have this Court adjudge and declare, that they are entitled to a right of way of necessity. (*Taylor v. Warnaky*, 55 Cal. 350.)

M. B. Blake and Cope & Boyd, for Respondent.

The so called covenant sued upon is not a covenant for or in reference to title, nor enforceable as such. It is not one of technical, "usual," or "full" covenants for title. (Rawle on Covenants for Title, (4th ed.), pp. 16, 23, 25, 27.) The grant is of certain land and of an easement of way. The words "to be and remain free and open as a public street," are words of qualification only. They are incorporated into the substance of the grant of the easement, and descriptive of its nature as a public instead of a private way; that is to say, one in which the grantee acquired and the grantor retained only rights consistent with its common use by the general public. By a grant of a private way, the grantee would have been enabled to prevent or control any dedication to public uses, and the object here is to guard against any such result. (*Regina v. Chorley*, 12 Q. B. 519; and see *Hall v. McLeod*, 2 Metc. (Ky.) 104, 105; Washburn on Easements, (3d ed.), 182, 216; Woolrych on Ways, p. 9, (* 11).)

The words are somewhat of the nature of a *habendum*, whose office is to show the extent and quality of the grant. If they were intended as a covenant, it is reasonable to suppose that they would have been separately expressed in the

usual place for covenants. The words are: be and remain, not become; words of present dedication, not of promise. The intention to make an agreement must be clearly manifested, otherwise covenants ought not to be implied. "In conveyances of real estate there must always be danger of implying anything that is not stipulated in clear and precise terms. This is the safest way of determining the extent of a grantor's responsibility." (*Lessee of Ewalt v. Gratz*, 2 Binn. 102; *Whitehill v. Gotwalt*, 3 Penn. 324, 325, 327; see Bingham on Real Estate, p. 430.)

If any covenant arises from the clauses of the deed relating to the street, it is governed and controlled by the operative words of the deed ("grant, bargain, sell," etc.), and is restricted to acts of the grantor. There is no general warranty of title or of quiet enjoyment, if A. grants, bargains, etc., to B. certain premises to have and hold in fee forever; nor is it otherwise if the grant is only of a right of way. No different rule should prevail if the grant be of a right of way over certain premises, "the same to be and remain a public street" (instead of a private way).

If a general warranty were implied in the words of grant, restraining words would be necessary in order to limit it; as only a limited warranty is so implied, enlarging words are equally requisite to extend the liability.

This is not a case of independent covenants. The clause is inwrought into the very substance of the grant, and makes up part of the description. As bearing on this point, see *Sweet v. Brown*, 12 Metc. (Mass.) 175, 176; *Allen v. Holton*, 20 Pick. 463; *Freeman v. Foster*, 55 Maine, 510; *Gale v. Reed*, 8 East. 80 (new ed., vol. 4, p. 334); *Browning v. Wright*, 2 Bos. & P. 13; *Clanrickard v. Sidney*, Hobart, [273], [275]; *Nind v. Marshall*, 1 Brod. & Bing. 319; S. C., 3 Moore, 702; Cf. *Bricker v. Bricker*, 11 Ohio St. 240; Rawle on Cov. for Title (4th ed.), 458-460, and notes; 486, and note 1; Platt on Cov. 58.

The complaint itself shows that the grant of the right of way was ineffectual in the nature of the case, and never has, nor could have, become operative; but it does not show that the same has been defeated or impaired by any act of the grantor or of the respondents, his successors in interest.

The grantor being only a tenant in common, having a small undivided interest in most of the premises over which the proposed street was to extend, his grant of the easement conferred no right as against his co-tenants. (Freeman on Co-tenancy and Partition, § 185; Washburn on Easements, 37 (*29); *Ward v. Dewey*, 16 N. Y. 519.)

The allegation of the complaint that there is not, and never has been, any street or way at all over the land described as such in the deed is fatal to the appellant:

1. The lot conveyed can only be located by reference to Minna street, and if there be no such street the description in the deed is void for uncertainty.

2. As the appellant himself admits that there is no street, he can not invoke the doctrine of estoppel against the grantor or his privies. The remedy by injunction, which is the one usually sought in such cases (and is the only one which might have any plausible ground for its support), is therefore inapplicable under the present complaint.

3. By appellant's own showing the alleged covenant does not run with the land; because, as there never was any street, the covenant was broken as soon as made. (*Lawrence v. Montgomery*, 37 Cal. 183, 188; 4 Kent's Com. *473; Rawle on Cov. of Title, 4th ed., 313, 318 n.)

The complaint shows that specific performance of the alleged covenant is impossible, and can not be compelled by the Court.

The complaint shows that appellant has no remedy in damages.

1. Such remedy could only be under the theory of a general warranty of title by respondents' ancestor (the grantor in the deed). If there be any warranty here, it is limited; but, aside from that, lineal and collateral warranties, with all their incidents, are abolished in this State. The covenants of warranty are now merely personal covenants, affecting only the covenantor and assets in the hands of his representatives. (Stats. of 1855, p. 171, Act of April 27, 1855, § 8; C. C., § 1115; 4 Kent's Com. *471; *Pollock v. Speidel*, 17 Ohio St. 439, 449; *Bricker v. Bricker*, 11 id. 245.)

2. Appellant can not bring himself within the saving clause on which he relies in the statute of 1855 (substan-

tially re-enacted in the Civil Code), viz: that "the heirs and devisees of every person who shall have made any covenant or agreement in reference to the title of, in, or to, any real estate, shall be answerable upon such covenant or agreement to the extent of the land descended or devised to them, in the cases and in the manner prescribed by law."

The clause in controversy here is not a "covenant or agreement in reference to title" at all, and certainly not within the contemplation of this statute, which, by any reasonable construction, must be held to refer only to express covenants, and such as were generally known as covenants for title.

Under our statutes, all liability of heirs for the obligations of their ancestor is terminated by close of the administration on his estate. The appellant's allegations in this regard are therefore fatal to his case. Again, heirs and devisees are only answerable "in the cases and in the manner prescribed by law." It is, we take it, reasonably clear, and in conformity with the received use of language, that by the "law" here referred to, the statutory, and not the common law, is intended. Only through positive enactments by the Legislature are the cases in which liability exists, and the manner of its enforcement to be prescribed.

Even at common law the complaint shows no right of recovery on the part of appellant. At common law, in order that an heir should be liable upon the obligations of his ancestor, it was requisite that he should be expressly named, and of this there is here no averment. (Rawle on Cov. for Title, (4th ed.) 461, 541, 554, 561; Platt on Cov. 61-63, 448, 449; 2 Wait's Actions and Defenses, 397.)

The complaint does not entitle plaintiff to the laying out of a "way of necessity," which would be the only other relief possible under any circumstances. The complaint counts distinctly on the supposed covenant for the special way over Minna street, and is substantially only a bill for specific performance of that covenant, or for the alternative of damages. It is not framed with reference to the laying out of any other way, and contains nothing upon which the Court could act with any certainty for that purpose, or upon which any issue could be raised by answer. (*Kuhlman v. Hecht*, 77 Ill. 570; *Nichols v. Luce*, 24 Pick. 102, 104; S. C., 35 Am. Dec. 302.)

Appellant did not purchase with any right to a way by necessity. What is called necessity, is only a circumstance resorted to in order to show and explain the intention of the parties, in raising an implication of a grant (Washburn on Easements, 41 ([*33]); and there is no room for implication where the parties have made other and express provision for a way.

Appellant alleges, that he wholly relied on the street and right of way specially conveyed, and if title to such street and right of way has failed, his remedy is the same and no greater than if it had failed as to the main lot conveyed.

Evidently, if the grant had been of a lot of land fronting on a street, but otherwise surrounded by land of the grantor, and title to the frontage had proved worthless, the grantee, though so far evicted as to be entirely shut off from any street, could not thereupon set up a claim to a way by necessity through the land of his grantor; and the principle is the same in the grant under discussion. In all these cases the rule is *caveat emptor*.

The COURT:

We are satisfied with the views expressed when the case was considered by Department One, and adopt the opinion delivered by the Department as the opinion of the Court in Bank. The case of *Taylor v. Warnaky*, 55 Cal. 350, cited by appellant, does not apply. James McElroy was only the owner of an undivided sixth of the land over which the right of way is claimed, at the time of his conveyance to the plaintiff, nor did the entire estate ever vest in him or his heirs.

Judgment affirmed.

The following is the decision of Department One referred to:

McKINSTRY, J.:

The complaint alleges that, on the twenty-seventh day of October, 1867, James McElroy, since deceased, in consideration of the sum of seven hundred dollars, paid to him by plaintiff, did, by his deed of that date, grant, bargain, sell, alien, remise, release, convey and confirm unto plaintiff, his heirs, executors, administrators—all that certain parcel of

land situate in the City and County of San Francisco, particularly described as follows: "Commencing on the southeasterly line of Minna street at a point distant one hundred and sixty feet eight inches northeasterly from the northeasterly line of Tenth street; thence running northeasterly along said line of Minna street twenty-two feet eight inches; thence at right angles southeasterly eighty feet; thence at right angles southwesterly twenty-two feet eight inches; and thence at right angles northwesterly eighty feet to said southeasterly line of Minna street at the point of commencement; together with the right of way in, upon, and over a street thirty-five feet in width, called Minna street, running from Tenth street to the southwesterly line of the lot of land thereby conveyed (to wit, said last described parcel of land); said street forever to be and remain free and open as a public street."

The complaint further shows that at the time the said James McElroy sold and conveyed as above, he was in possession and seised in fee "to the extent of one undivided sixth part" of a tract of land over and through which the way—Minna street—was to be kept open (as by McElroy's "covenant") from Tenth street to a transverse line running across the proposed Minna street, eleven feet four inches distant northeasterly from the line of the lot so as above sold and conveyed by James McElroy to plaintiff; and that, for the said distance of eleven feet four inches, the said James McElroy was, at the time of said sale and conveyance, the sole owner of the land through which the proposed Minna street was to run.

The complaint further alleges that after the death of James McElroy, and before the estate of the said James McElroy was distributed, one John McDermott, one of the tenants in common in the tract of land in which James McElroy, in his life-time was so, as aforesaid, the owner of an undivided one sixth part, instituted an action in the District Court of the Nineteenth Judicial District for said city and county, against all of the tenants in common of said tract (including the defendants herein, who are the widow and children and lawful heirs of James McElroy, deceased), and that such proceedings were had therein, that a final decree of partition was made;

that by said decree a tract of land, which includes the proposed Minna street for a distance of sixty-three feet six inches (immediately adjoining to and to the northerly of the eleven feet four inches exclusively owned by said James McElroy in his life-time) was assigned and allotted in severalty to the defendants in the present action, as the part and share of said tract to which the heirs of said McElroy were entitled in severalty.

The complaint further alleges that at the time of the conveyance by James McElroy to plaintiff, seven hundred dollars (the consideration therein named) was the full, fair, and just value of the land conveyed, with said street and right of way conveyed therewith, as aforesaid, but without such street and right of way said land was not worth said sum, and was wholly without means or way of ingress or egress from or to any public street or highway.

That, January 17, 1871, said James McElroy died intestate in said city and county whereof at the time of his death he was resident, leaving real and personal estate situate therein, and leaving him surviving defendant Susan McElroy, his widow, and the other defendants, his surviving children and lawful heirs; that upon petition and proceedings regular thereupon, and February 3, 1871, the Probate Court for said city and county duly granted letters of administration upon the estate of said deceased to said Susan, widow as aforesaid, who duly qualified and entered upon the discharge of her duties as administratrix; that due notice to creditors and claimants was had, etc. And afterwards, on January 27, 1876, by decree of said Probate Court, the estate of said James McElroy, deceased, was distributed as follows, to wit: To Susan McElroy one third part, and to defendants Annie M. Jennie, Emma Mary E., and James P. McElroy, each two undivided fifteenth parts of the following real estate—(describing two tracts, one tract being the tract herein referred to as including eleven feet four inches of the proposed Minna street, and the other being the tract set aside to the widow and heirs of the said James McElroy, deceased, by the decree of partition).

The complaint also alleges that on January 2, 1876, Susan McElroy was, by the decree of said Probate Court, finally

discharged from her office of administratrix, and administration of the estate closed, and that all the property of which James McElroy died seised was community property of the said James and his wife, the said Susan. Further, that defendants, since the decree of distribution, have remained owners respectively of the land distributed to them. The complaint further avers that at the time of the execution of said deed of conveyance by said James McElroy to plaintiff, "said Minna street was not an open public street or highway, extending from the parcel of land conveyed as aforesaid, to said Tenth street, or for any part of that distance, or at all; and there is not and never has been any Minna street, or any street or way at all, in, upon, over, or along the whole or any part of said Minna street, as in said deed is described, and agreed forever to remain an open public street; but although there is not and never was any Minna street, as last stated, the property owners adjoining said parcel of land suffered and permitted plaintiff to freely pass over their lands to said parcel of land of plaintiff, and from thence to the public highway, up to within the past three or four months;" that since he has been forbidden ingress and egress from his land to the public streets and highways of the city, he has requested defendants to open said Minna street as in said deed described, or otherwise to afford plaintiff means of ingress and egress, but said defendants, although often requested, have refused, etc.

The special prayer is, that the defendants be compelled specifically to perform said covenant, and to open said Minna street to the extent and in the manner in said deed of conveyance described; and this is followed—in the event of the granting of the specific prayer not being practicable—by the general prayer that plaintiff have such other and further relief as shall seem meet, with costs, etc.

To the complaint the defendants, severally, demurred on the ground that the same did not state facts sufficient to constitute a cause of action.

The District Court sustained the demurrer, and the complaint not being amended, final judgment was rendered and entered that plaintiff take nothing by his action, and that defendants have and recover their costs, etc.

This appeal is from the judgment.

Many curious and interesting questions are suggested by the demurrer, some of which were argued with much force and ingenuity. But in the view we take of the case—even if appellant is entirely right with respect to the positions by him assumed—the demurrer was properly sustained. The conveyance from James McElroy to plaintiff is not set out at length in the complaint. The averment at the commencement of the pleading is that “*James McElroy*, since deceased, did, by his deed of a certain date, bargain, sell, etc., unto plaintiff, *his* heirs,” etc. Nowhere in the complaint is there an averment that James McElroy ever attempted to bind his heirs by any covenant. The words “said street forever to be and remain free and open as a public street”—if they constitute any covenant—are either a covenant of seisin—in which case there was a breach so soon as the covenant was executed (since the grantor had no title to the right of way, nor any which could affect the rights of his co-tenants in the lands, over which the way was to run)—or they were a covenant in the nature of warranty, or for quiet enjoyment, in which case the covenant was not broken, until the assertion of paramount adverse and legal right. If the words quoted are a covenant of *seisin*, on which the covenantor became liable when the deed was executed, the claim for the breach should have been presented to the administratrix of the estate of James McElroy. As the law stood when the deed was executed, and at the death of the covenantor, the heirs became answerable upon the covenant to the extent of the land descended to them “in the case and in the manner prescribed by law.” (Stat. 1855, p. 171.) Both the real and personal property of a decedent were made liable by our law for the satisfaction of *all* claims or demands existing against the deceased at the time of his death. To reach the assets of the estate, however, the claim had to be presented as required by the provisions of the Code of Civil Procedure relating to the settlement of the estates of deceased persons. (*Hartman v. Lee*, 30 Ind. 281.)

If, on the other hand, the words cited from the deed are to be construed as a covenant to warrant and defend covenantee in the enjoyment of the right of way against all lawful objec-

tors, or that covenantee quietly enjoy the use thereof undisturbed by any lawful obstruction, and the breach occurred after the death of covenantor, (and assuming the question not to be affected by any statute of this State), the heirs are not bound unless the deceased expressly covenanted that they should be bound. At common law to make the heir responsible it was essential that he be expressly named in the bond or covenant of his ancestor. (2 Wait's Actions and Defenses, 397.) And in an action against him as heir an averment was necessary that he was named in and bound by the bond or covenant. Such was the rule as to the ancient warranty. (Rawle on Covenants for Title, 4th ed., 461; Co. Litt. 384.) "If a covenantor covenants for himself and *his heirs*, the heirs are bound to perform it." (2 Bla. Com. 304.) "A covenant may be real, having for its object something annexed to or inherent in, or connected with land or other real property; although it may be purely personal to the covenantor, and his personal representatives, *because he has omitted to name his heirs*." "A covenant, though clearly personal, or relating to personalty, may be a covenant real, because the heir *being named*, will be liable in respect of assets by decedent," etc. (Platt on Covenants, 63.) To create liability on the part of the heir it is requisite that the terms of the covenants specially provide for its performance by him. (Id. 449.)

In the complaint before us it is not stated, even by way of recital, that James McElroy covenanted that his heirs should be bound. The word heirs was not necessary under our statute to create or convey an estate in *fee simple*. (Stats. 1855, p. 171.) But there was no statute which made the lands descended to the heir liable for the covenants of the ancestor except the statute, which applied all assets to the payment of decedent's debt—through the machinery of the Probate Court. The very basis of plaintiff's claim here is that the probate law does not affect his right to maintain the present action.

Judgment affirmed.

Ross and McKee, JJ., concurred.

[No. 7,146.—In Bank.]

May 26, 1882.

PEOPLE EX REL. SABIN HARRIS v. FRANCIS BLAKE
ET AL.

DEDICATION OF STREET—ABATEMENT OF NUISANCE—INJUNCTION—ACTION BY THE STATE.—In an action by the people of the State to have certain premises in the City of Oakland adjudged to be a public street and for the abatement of obstructions therein, and for an injunction the Court, (upon the evidence stated in the opinion), found that the land in question was the property of the defendants, and had never been dedicated by them or their predecessors in title as a street, and judgment was entered for them accordingly. (McKEE, J., and ROSS, J., dissenting.)

Held: The evidence shows a dedication by defendant's grantors; and the Court erred in finding to the contrary. The elements entering into and constituting a dedication, viz., an intention by the owner, clearly indicated by his words or acts to dedicate the land to public use, and an acceptance by the public of the dedication, established by the use by the public of the land for the purpose to which it had been dedicated, are clearly manifested.

ID.—EVIDENCE.—On the trial the relator offered to prove certain declarations by predecessors in title of the defendant (before any conveyance by them) to the effect that the premises in controversy were a public street, but the evidence was excluded by the Court. *Held:* The evidence was admissible.

APPEAL from a judgment for defendant, and from an order denying a new trial, in the Third District Court of the County of Alameda. McKEE, J.

George E. Whitney, for Appellant.

At least two of the deeds in the defendants' chain of title, introduced by them in evidence, refer to the street in question. And Clark, the lawyer who drew the deed, would testify that the boundary by the street was put into the description for the purpose of showing a dedication of the street; and that Van Auken, the grantee, took the deed with full notice that the street was held to be a dedicated street by his grantors. The judgment of the Court practically finds that there was no Fourteenth street where defendants' deed refers to it as a descriptive monument. We insisted that by the acceptance of this deed by Van Auken, he and his successors in interest, including the defendants, were estopped to deny the existence of Fourteenth street at this point. (*Hunter*

v. *Sandy Hill*, 6 Hill, 411; Angell on Highways, § 154; *Brown v. Manning*, 6 Ohio, 303; S. C., 27 Am. Dec. 255; *Morgan v. Railroad Co.*, 96 U. S. 716; *Oswald v. Grenet*, 22 Texas, 94.)

"The intent to dedicate will be presumed against the owner when it appears that the easement in the street or property has been used and enjoyed by the public for a period corresponding with the statutory limitation of real actions." (Dillon on Mun. Corp., § 500, and cases cited; 2 Greenl. Ev., tit. Prescription, §§ 537 *et seq.*; *Commonwealth v. Cole*, 26 Pa. St. 187; *Thayer v. Boston*, 19 Pick. 514; S. C., 31 Am. Dec. 157; *Hoadley v. San Francisco*, 50 Cal. 265; *People v. Pope*, 53 Id. 451; Pol. C., § 2619.)

C. A. & C. Tuttle and S. F. Gilcrist, for Respondents.

A dedication to the public use of land must rest on the intention or clear assent of the owner. (*Irwin v. Dixon*, 9 How. 10; S. C., 18 Curtis, 6; *Hunter v. Trustees of Sandy Hill*, 6 Hill, 407.)

In *The State v. Nudd*, 3 Foster, 327, it was held that, although unenclosed land for more than twenty years had been traveled, but it did not appear that it was ever laid out as a highway, or fenced, or repaired as such, that there was no dedication. It is also said that less presumption of a dedication arises where the land is unenclosed, and the prohibition of a passage over it might be considered as churlish. In *Shelby v. The State*, 10 Humph. 165, it was held that where the public ceased to use a road and the owner of the soil resumed the use of it, and the public acquiesced for a term of three years, an abandonment was presumed. In this case it is twenty-two years since what is claimed as a street was fenced up, and there is no evidence that the owner ever, by any act, dedicated it.

To constitute a dedication, "there must be such user by the public, and such an acquiescence in the use by the owner of the soil, as to establish an *animus dedicandi*." (Wood on Nuisances, §§ 241, 242, 248; *Pool v. Haskensen*, 11 M. & W. 830; *San Francisco v. Canavan*, 42 Cal. 541; Wash. on Easements, 182; *San Francisco v. Scott*, 4 Cal. 114.) A ded-

ication must be accepted. (*State v. Trask*, 6 Vt. 355; S. C., 27 Am. Dec. 534; *Noyes v. Ward*, 19 Conn. 250.)

MYRICK, J.:

This is an action to obtain a decree adjudging certain premises in the City of Oakland to be a public street; that the defendants be directed to remove certain buildings and obstructions therefrom, and that the defendants be enjoined and prohibited from erecting any buildings or obstructions thereon.

The Encinal of San Antonio, which embraces a portion of the present City of Oakland, and all of the premises in controversy, was, on the fifteenth day of August, 1853, owned by Jos. K. Irving and others as tenants in common. Previous to that date said owners had caused said lands to be surveyed for the purpose of partition, adopting a survey of the town of Oakland previously made by one Kellersberger under the employment of persons not holding the title, and dividing the remainder not included in said town survey into four tracts designated by the letters A, B, C and D. Tract D, as thus surveyed, adjoined the town of Oakland on the north; it contained two hundred and twenty-five acres, and included the premises in controversy. On said fifteenth day of August, 1853, by deed of partition, tract D was allotted to said Irving, and also block 191 and other blocks, as per the survey of the town of Oakland, which block 191 bounds the premises in controversy on the south. The plots of these surveys were recorded. Irving received tract D in trust for himself and others who were joint owners with him therein. A diagram of the tract was made for the purpose of distribution among themselves, and on the fourteenth of May, 1854, said Irving, by deeds, conveyed to his co-owners their respective shares in severalty. To one of the deeds was attached a copy of the diagram, and the other deeds referred to it, the conveyances being of lots according to the diagram, Lot No. 9 and a part of Lot No. 1 were conveyed to James M. Goggin, from whom the defendants deraign title to the premises in controversy.

The description in this deed contains the following: "Commencing at a point on the easterly line of Broadway, where Broadway crosses the north line of the town of Oakland, and running thence along the north line of the town," etc.,

thence north, west and south, to the place of beginning, embracing a tract bounded on the south by the town of Oakland. In August, 1853, said Irving had for value conveyed to Jones and others block 191, of which block at least six lots fronted on tract D., and had no other approach than across or upon the tract. On the fifteenth of May, 1854, said Irving, for value, conveyed to Lander and Tiffany parcels of land in said tract D, described as follows: "Commencing at a point on the northern line of Fourteenth street of said city, 11.85 chains southeastwardly from the corner of Broadway and Fourteenth street; thence southeastwardly along said line of Fourteenth street 7.65 chains," etc.; also "commencing at a point on the northern line of said Fourteenth street 20 chains northwestwardly from the corner of Broadway and Fourteenth streets, thence along the northern line of Fourteenth street ten chains," etc. This deed was recorded at least thirty days prior to the recording of the deed to Goggin. Various witnesses acquainted with the premises at different periods show from 1852 to 1859, there was an open traveled way, known as Fourteenth street, extending along north of the north line of the original plat of the town of Oakland, and over the premises in controversy, used by the public as a thoroughfare; that in the years 1856, 1857, 1858, there were fences on the north and south sides of Fourteenth street; and that the street was closed up in 1858 or 1859, by one Van Auken, a party in defendants' chain of title. The title of defendants is as follows: Deed, as above stated, Jos. K. Irving to Goggin; Goggin to Marshall and H. P. Irving; Marshall and Irving to Van Auken, as follows: "Commencing at a point where the easterly line of Broadway crosses the southerly line of Fourteenth street, thence running along the southerly line of Fourteenth street, south 64 degrees east 300 feet, thence at right angles with Fourteenth street, north 26 degrees east 180 feet, thence north 64 degrees west and parallel with Fourteenth Street, 300 feet more or less to the easterly line of the Peralta Road; thence southerly along Peralta Road to the place of beginning;" deed from Van Auken to Carlyle containing the same description as the last; and from Carlyle to defendants by mesne conveyances.

The Court below found that the premises in controversy

had not been at any time a public street, had not been dedicated as such by defendants or any of their grantors; that defendants were the owners of the premises; and accordingly rendered judgment for them.

On the trial the relator offered to prove "that at the time of the making of the deed from Marshall and Irving to Van Auken, it was talked that there was a Fourteenth street there; that Irving and Marshall proposed to sell the one hundred feet on the north side of Fourteenth street; that Van Auken desired to have the eighty feet of Fourteenth street included in his deed; that Marshall and Irving refused, objecting that Fourteenth street was a public street; that Van Auken then broke off negotiations, but subsequently came back, and without paying anything for Fourteenth street, and upon his representation that he would not close it up, but always hold it as a street, and that he only wanted to keep other people from squatting upon it—with that distinct understanding the deed was made to the south side of Fourteenth street; that the boundary by the street was put into the description for the purpose of showing a dedication of the street; and that Van Auken took the deed with full notice that the street was held to be a dedicated street by his grantors." The evidence was objected to, the objection was sustained, and the relator excepted.

A witness testified: "I had a conversation with Van Auken subsequent to the making of the deed, when he commenced to fence the street; I told him it was well understood he was not to fence up that street; that he only took that, as he said at the time prior to the execution of the deed, for the purpose of protecting himself in case anybody should attempt to jump it; he admitted it, but claimed he had a right to protect himself by doing it. I also heard Marshall and Irving, while owners of property there, before the sale to Van Auken, declare that Fourteenth street was a street." Another witness testified: "About four years ago, while P. S. Wilcox (one of the persons in defendants' chain of title) was the owner of the property, I asked him to open the street, and told him we could sell the property in block 191, provided I gave bonds that the street would be opened. He told me to give a bond, it did not make any difference what kind of a

bond. He said 'the street shall be opened, I want it open, and am going to have it opened, and if I can bulldoze the city out of something, I am going to do it; but it shall not cost you a cent.' He did not open the street, but soon after sold the property to the defendants."

From the facts admitted, or in evidence, it appears that the property in question was used as a public street from 1852 until 1859, when it was closed up by Van Auken; that while tract D. and the other tracts were owned by Jos. K. Irving, Goggin, and others, as tenants in common, said Irving conveyed block 191, containing at least six lots fronting on what was used as a street; that on the day following the deed in partition of Irving to Goggin, Irving, for value, conveyed two parcels of tract D., bounding the same by Fourteenth street, the deed thereof being recorded prior to the deed to Goggin of the premises in controversy; that while the defendants' grantors, Marshall and Irving, were the owners of the fee, they declared that Fourteenth street was a street, it being then in use as such; that their grantee, Van Auken, while he was the owner of the fee, declared that when he purchased he knew that it was a street, and took a deed for the purpose of protecting himself from attempts to "jump" it; that Wilcox, defendants' immediate grantor, retained the buildings and enclosures upon it only for the purpose of extorting money from the city. We have, also, the description in the deed from Irving and Marshall to Van Auken, and the subsequent deeds in defendants' chain of title, bounding the premises therein described by "Fourteenth street." Then there is the offer to prove that pending the negotiations between Marshall and Irving and Van Auken, the bargain was for a tract of land north of Fourteenth street, leaving the street open, and the subsequent including of the street in the deed solely for the purpose of enabling Van Auken to protect it as such, and that Van Auken had full notice that the street was held to have been dedicated by his grantors as a street.

We think the record displays two errors:

1. We think the evidence shows a dedication by defendants' grantors, and that the Court erred in finding that it did not, and in finding that the premises do not constitute a public street. We think that the elements entering into and

constituting a dedication (*San Francisco v. Canavan*, 42 Cal. 554), viz., an intention by the owner, clearly indicated by his words or acts, to dedicate the land to public use, and an acceptance by the public of the dedication, established by the use by the public of the land for the purpose to which it had been dedicated, are clearly manifested.

The deed of May 15, 1854, from Irving to Lander and Tiffany, of the two parcels of land, one east and the other west from the premises in controversy, although it bounded the tracts therein conveyed by Fourteenth street, might not of itself have affected the premises in controversy, or have tended to show that Irving intended a dedication of land for a street extending from one of said tracts to the other; neither, perhaps, would the fact that lots in block 191 had no other outlet have necessarily proved a dedication of the land adjoining as a street; but those facts, taken in connection with the continuous user by the public, the description in the deed of Marshall and Irving to Van Auken, the declarations of Marshall, Irving, Van Auken, and Wilcox respectively, while owners, were evidence of a dedication. The subsequent acts and declarations had reference to a street as referred to in the prior conveyance, and as in actual use, and recognized it as an existing fact. The acts of all the owners up to the time of fencing, in 1859, are harmonious with the theory of a dedication, and with no other.

2. The relator was entitled to the evidence offered by him relating to the transaction between Marshall and Irving and Van Auken. (Sec. 1,849, C. C. P.)

Judgment and order reversed and cause remanded for a new trial.

MORRISON, C. J., and SHARPSTEIN, J., concurred.

THORNTON, J.:

I concur in the judgment of reversal. In my opinion the facts are not sufficiently and properly found.

McKEE, J.:

I dissent. The men who entered into the adverse possession of a portion of that part of the territory of Alameda

county, known to the claimants of the Peralta Rancho as the Encinal of San Antonio, caused the land upon which they had entered to be surveyed and divided into blocks and public squares, intersected by streets, a map of which was made, and has been since known as Kellersberger's Map of the Town of Oakland.

When the owners of the Spanish title to the Encinal lands came to make partition among themselves as tenants in common of their lands, which lay within and without the territory included inside the lines of the Kellersberger map, they adopted the map as their own, referred to it as such in their deeds of partition, made it part of those deeds, and had it recorded in the Recorder's office of Alameda County, on September 2, 1853.

The streets of the town of Oakland were laid out on the map from the northern line of the town, as designated on the map, to the southern boundary line in the San Antonio creek; others, at right angles with the former, were laid out from east to west, parallel with the creek and the northern line. Those parallel streets commenced at the water front, and were designated on the map as First, Second, Third, and Fourth streets, and so on to and including Thirteenth street, which was the last of the numbered streets on the map. The last tier of blocks on the map fronted south on Thirteenth street, and abutted on the north line of the town, as designated on the map. No such street as Fourteenth street, on the northern line of the town, was laid out on the map. But it is contended that the owners of the land dedicated a strip of land eighty-five feet wide immediately outside this northern line, and that they called it Fourteenth street, and that's the question.

Dedication of land to public use is purely a question of intention. Where the intention of the owner to abandon his land to the use of the public is manifested by deliberate and unequivocal acts, and the land has been accepted by the public authorities, the dedication is complete. But the acts of both the donor and the public authorities must be unequivocal and satisfactory of the design to dedicate on the one part and to accept on the other. (*The City of San Francisco v. Canavan*, 42 Cal. 541.) Until acceptance the public can ac-

quire nothing, and the dedication, whether made by deed or otherwise, may be revoked by the owner of the land. (*San Francisco v. Calderwood*, 31 id. 585; *Harding & Loftin v. Jasper*, 14 id. 647.)

Now, when the original owners of the land made the Kellersberger map, or, which is equivalent to the same thing, adopted and had recorded the map made by the original squatters, they thereby dedicated to the public use all the streets and public squares to the extent as designated on the map. But as no such street as Fourteenth street is laid out on the map, the map is no evidence of an intention on their part to dedicate the land for such a street. Nor did they, as tenants in common, in making partition of their lands among each other, dedicate by deed or otherwise, the land in controversy as a street. For, in making partition, they divided their lands into four parcels or tracts, which were respectively designated on a map of partition as tracts A, B, C, D. Tracts A, B, and C were situate westward of the town of Oakland as laid out on the map of the town, and tract D lay on the north of the town. The latter tract containing two hundred and twenty-five acres, was allotted in severalty to Joseph K. King. A plat of the allotment was made which showed that the southern boundary line of the plat was the northern boundary line of the town, and the deed by which the land was conveyed to Irving describes the tract as it is laid out on the plat. The plat was annexed to the deed and both were recorded, and they contain no evidence of dedication of Fourteenth street—no such street is designated on the plat or called for by the deed.

Irving thus became the owner in severalty of the land embraced in tract D. But he held the title to it in trust for himself and others, and, in 1854, he caused that part of the tract lying east of what is designated on the plat as the Peralta road, to be subdivided into thirteen blocks of ten acres, and some fractional blocks, for the purpose of transferring to his co-owners their respective interests in the land, and made a plat of the land thus subdivided. Of these blocks he conveyed to his co-owners their respective interests in severalty by deeds, to which a copy of the plat was annexed and made a part of each deed, and as such was re-

corded. Four ten-acre blocks and a fractional block were extended on the northern line of the town of Oakland, as designated on the Kellersberger map; and that line constituted the southern line of the blocks. These blocks were designated on the plat as 1, 2, 3, 4, and 5. The first (No. 1) commenced on the east line of the Peralta road outside of the town, and eastward of it; in regular succession, followed lots 2, 3, 4, and 5, along the north line of the town. The subdivisions, as designated on the plat, were not intersected by any streets whatever, and there is no space left on the plat for a street. All the deeds made by him of the tier of blocks on the north line of the town, call for that line as the southern boundary line of the blocks. In conveying part of block 1, and block 9, immediately north of it, to J. M. Goggin, the land is described as follows: "Commencing at a point on the easterly line of Broadway, where Broadway crosses the north line of the town of Oakland, and running thence along the north line of the town south sixty-four degrees east, six chains eighty-nine links; and thence north twenty-six degrees east, ten chains; thence south sixty-four degrees east, two chains and sixty-one links to the northeasterly corner of said subdivision lot number 1, the same being also the point of commencement of the land this day conveyed by the party of the first part to Humphrey Marshall; thence north twenty-six degrees east, along Marshall's said land, three chains and eighty-five links to the land this day conveyed by the party of the first part to Samuel A. Morrison; thence south sixty-four degrees west, along Morrison's land to the center of the said Peralta road, supposed to be thirteen chains; and thence southerly through the center of said Peralta road, and of Broadway as extended, to a point in the center of Broadway on the north line of the town of Oakland; thence upon a straight line to the point of beginning, containing twelve and ninety-seven hundredths acres, be the same more or less."

Nearly a year before the execution and delivery of that deed to Goggin, Joseph K. Irving had, also, conveyed to one Jones the co-terminous block on the south, within the town of Oakland, numbered block 191 on the Kellersberger map, the northern line of which coincided with the northern line of the town of Oakland and the southern line of lot 1; and the land

in controversy is situate in the southwestern corner of lot 1 as conveyed to Goggin.

While Goggin was the owner he did no act whatever manifesting an intention to dedicate the land in controversy, or any part of lot 1, to the public use. On the contrary, he afterwards conveyed the lot just as he had received it from Joseph K. Irving, and by the like description in the Irving deed.

So far, therefore, it is manifest that none of the owners of the land in controversy ever dedicated it to the use of the public: nor did they, or any of them, ever, at any time, reserve a strip of land eighty feet wide for a street on the northern line of the town of Oakland, as designated on the Kellersberger map, nor did they or any of them ever sell or convey any land bounding it on such a street. Such a reservation was not made on the Kellersberger map, nor on the plat of tract D annexed to the partition deed made to Joseph K. Irving; nor on the plat of subdivisions of tract D made by Joseph K. Irving; nor in or by any deeds of conveyance by which he transferred the several lots in tract D on the northern line of the town to Goggin, Marshall, Morrison and others.

But while Goggin was owner of lot 1 outside the town line, and Jones owner of block 191 inside the town line, their common grantor, Joseph K. Irving, conveyed to Tiffany and Lander the southeastern portion of block 2, of tract D by the following description:

"A certain lot or parcel of land bounded as follows: Commencing at a point on the northern line of Fourteenth street of said city, eleven and eighty-five one-hundredth chains southeastwardly from the corner of Broadway and Fourteenth streets; thence southeastwardly along said line of Fourteenth street seven and sixty-five one-hundredth chains; thence at right angles ten chains in a northeastwardly course; thence in a northwestwardly course parallel with said Fourteenth street seven and sixty-five one-hundredth chains; thence in a southwesterly course ten chains to the place of beginning, the same being the southeastern portion of the lot designated as No. 2 on the map hereunto annexed, containing seven and six-hundredth acres."

This description does not include the premises in contro-

versy. The map referred to in the description and annexed to the deed is an exact copy of the plat of subdivisions of tract D, on which, as already shown, there is no such street as Fourteenth street; and, in fact, there was no such street as "Fourteenth street of said city," within the limits of the town as indicated by the map. In the description of the land we have, therefore, an imaginary street, and a map of the land. Where a map is referred to and made part of a deed, it is to be regarded as a more authoritative manifestation of the understanding of the parties than a verbal description of a line or a street not shown on the map. The map is regarded as a photograph of the land intended to be conveyed, and imaginary lines or streets will be discarded as less certain and reliable than the map. (*Vance v. Fore*, 24 Cal. 435; *Peury v. Richards*, 52 id. 672; *McKeon v. Millard*, 47 id. 581; *Powers v. Jackson*, 50 id. 429.)

Taking the map as the correct description of the land conveyed, the deed does not prove an actual dedication of any portion of the land for a street; and if it did, it does not include the land in controversy. Nor does the false call in the deed for a street, which was not on any of the plats or maps in evidence in the case, and which had not been laid out by any of the previous owners of the land, indicate an intention on the part of the grantor to abandon any portion of the granted premises to the use of the public. But even if such an intention were inferable, it could only be inferred with reference to the granted premises; and as those did not include the land in controversy, which then belonged to J. M. Goggin, nothing contained in the deed to Tiffany and Lander could impair Goggin's rights to his land nor divest him of his title to it. He was not bound by any act of Irving expressed in the deed to Tiffany and Lander. Recitals in a deed do not affect strangers to it; they are only binding upon those who are parties to the deed or privies in estate.

As owner in fee of the land Goggin conveyed it, as part of lot 1 of the subdivision of tract D, to Humphrey Marshall and H. P. Irving by a deed containing the same description as that contained in the deed from his grantor; and his grantees, Marshall and Irving, conveyed it as part of the same

lot to one Van Auken in the year 1850, by a deed in which the lot is described as follows:

"Being part of lot No. 1, said lot No. 1 being a subdivision of a tract designated on the map known as the map entitled 'Map of a part of the Oakland Encinal, designated as letter D, laid out in lots for subdivision,' which is annexed to a deed made May 10, 1854, made by Josef K. Irving to Humphrey Marshall, and more particularly described as follows: Commencing at a point where the easterly line of Broadway crosses the southerly line of Fourteenth street; thence running along the southerly line of Fourteenth street, south sixty-four degrees east, three hundred feet; thence at right angles with Fourteenth street, north twenty-six degrees east, one hundred and eighty feet; thence north sixty-four degrees west, and parallel with Fourteenth street, three hundred feet more or less to the easterly line of the Peralta road; thence southerly along Peralta road to the place of beginning."

What has been said as to the description of the premises in the deed to Tiffany and Lander is applicable to this deed. The intention of the parties to convey the land in controversy is clear. It is included in the general description, and it is not excluded by the particular description. But in the particular description there is a call for a street, which, as has been shown, none of the former owners of the land had laid out or dedicated. It is therefore a false quantity in the description, which must be rejected. (*Haley v. Amestoy*, 44 Cal. 132; *Piper v. True*, 36 id. 606; *Reed v. Spicer*, 27 id. 57.) Rejecting it, the title to the land in controversy passed by the deed to Van Auken; and, as owner in fee thereof, he entered into possession of the lot, of which it was a part, and inclosed it; and he and his grantees have been in the undisturbed actual possession of the same for more than twenty years.

I have shown that none of Van Auken's grantors, immediate or remote, dedicated a strip of land eighty feet wide, for a street known as Fourteenth street, to the east of Broadway street, on the north line of the town of Oakland, as designated on the town map; that the land in controversy is part of lot 1 of the subdivisions of tract D, the southern line of which coincided with the northern line of the town; that the

land passed by regular mesne conveyances from the owners of the original Spanish title to Van Auken, who took possession of it, and fenced it within the general inclosure of the premises acquired from his immediate grantors; and that the defendants and their grantors have been in the actual use and occupation of the same from the year 1859 until now as owners in fee. Under such circumstances, no presumption of dedication can arise from the user by the public of any part of the land, before it was included within the general inclosure of the owner. (*San Francisco v. Scott*, 4 Cal. 115.) Such user, if evidence of dedication, would be equally evidence of abandonment to the public use of the entire lot; for, until it was inclosed by Van Auken, in 1859, it was an open common, and the public traveled over it at their own free will.

Until Van Auken took actual possession of lot 1 as designated on the plat of subdivisions of tract D., and inclosed it, there is, therefore, no satisfactory proof of a dedication of it to the public use, nor of acceptance by the public authorities. As private property the land in controversy came into the possession of the defendants, and it is not claimed that they, as owners of it, or their immediate grantors, from whom they received it, have ever actually dedicated it, or did any acts, or made any declarations by which they are estopped from claiming it unburdened by any easement.

But it is contended that the Court below erred in rejecting an offer to prove, by the testimony of a witness, that when Marshall and Irving, in 1859, conveyed the land described in their deed to Van Auken, "it was talked there was a Fourteenth street there;" that they offered to sell to Van Auken one hundred feet north of it, but he refused to purchase unless the entire premises, including the land in controversy, were conveyed to him; and, upon his saying to them that he wanted the land to protect himself against squatters, and did not intend to inclose it, they sold and conveyed to him the entire premises as described in their deed.

It is said that the rejection of this offer was erroneous, because Section 1849, C. C. P., declares that when one derives title to land from another, the declaration, act, or omission of the latter, while holding the title, in relation to the property,

is evidence against the former. This section of the Code but formulates the common law rule of evidence, which admitted as original evidence every declaration or act accompanying an act of possession, whether in disparagement of the claimant's title, or limiting or qualifying his possession. Under that rule, before the adoption of the Codes, evidence of the declarations or admissions of a party in possession of land, in relation to his property therein, was always admissible in evidence (*McFadden v. Ellmaker*, 52 Cal. 349; *Fischer v. Bergson*, 49 id. 295; *Draper v. Douglass*, 23 id. 347; *McFadden v. Wallace*, 38 id. 51; *Bollo v. Navarro*, 30 id. 459); but it was only admissible: 1. As against those claiming the land under the person making the declarations; and, 2. To show the character of his possession. Being in possession the law presumed that he was seised in fee of the land; but that presumption was subject to be overcome by declarations or admissions made on the land showing that he was only a tenant for years, or entered into possession under lessors, or otherwise qualifying his possession. To that extent the rule admits declarations as original evidence against him and those claiming under him; but it excludes declarations or admissions to prove a disclaimer of title (*Jackson v. Vosburgh*, 7 John. 186); or to prove or disprove a title (*Jackson v. Shearman*, 6 id. 21). Title to land can neither be made nor unmade by parol evidence (*Jackson v. Cary*, 16 id. 303); nor can such evidence be used to impair or destroy the record title (*Pitts v. Wilder*, 1 N. Y. 525; *Gibney v. Marchay*, 34 id. 301; *Dodge v. Freedman's Sav. & T. Co.*, 93 U. S. 383).

Now the "talk" or declarations of the grantors of Van Auken were not made upon the land, for they had never been in possession of it. As grantees of Goggin they were holders of the legal title, unburdened by any easement on the land; and the estate which they derived from him they transmitted unimpaired to their grantee, from whom the defendants by mesne conveyances derive their title. "Talk that there was a Fourteenth street there" was, therefore, neither in disparagement of their title, nor did it accompany or qualify a possession which they had not. And if it was offered for the purpose of proving a dedication by them, it had no tendency to prove it, in the absence of proof of a ded-

ication by any one of their predecessors in interest. As, therefore, neither they nor any of their predecessors had been in the actual possession of the land; and neither they nor any of their predecessors in interest while holding the legal title had laid out on any map or plat of the land such a street as Fourteenth street or dedicated it to the public use, the mere "talk" or surmise of a street could not have the effect of impairing, limiting, or qualifying the title to the land which ultimately passed to the defendants, and there was no error in rejecting the offer.

Yet, if it was error, it was error without injury, for the error was cured by the testimony of the witness (*Barilari v. Ferrea*, 8 P. L. J. 628), who, subsequently, and without objection, testified on the subject as follows: "I heard a conversation with Van Auken after the execution of the deed, when he commenced to fence the street. I told him it was well understood he was not to fence it; that he only took it, as he had said, at the time of the execution of the deed, for the purpose of protecting himself in case anybody should attempt to jump it. He admitted it; but claimed that he had a right to protect himself by doing it. I have also heard Marshall and Irving, while owners of property there, declare, before the sale to Van Auken, that Fourteenth street was a street." And, on cross-examination, "I have no recollection of any particular time when these conversations or declarations were made, except at the time of the negotiations with Van Auken." The plaintiff, therefore, had the benefit of his offer, upon the testimony of which, in connection with the other evidence in the case, the Court below found there was no dedication; and as the record contains no satisfactory proof of a dedication and of acceptance by the public authorities, and no error prejudicial to the appellant, the judgment and order should be affirmed.

Ross, J., concurred.

[No. 8,221.—In Bank.]

May 26, 1882.

F. B. WHITING v. T. L. HAGGARD.

FEES OF CLERK OF BOARD OF SUPERVISORS OF PLUMAS COUNTY—STATUTES
—CONSTITUTIONAL LAW.—The provisions of the Act of 1878, relating to fees of county officers in Plumas County (Stats. 1877-8, p. 547), which were to take effect on the first Monday of March, 1880, never went into effect.

APPLICATION for writ of mandamus.

The facts are stated in the dissenting opinion.

John C. Hall and *J. D. Goodwin*, for Plaintiff.

R. H. F. Variel, for Defendant.

The COURT:

On the authority of *Peachy v. Board of Supervisors of Calaveras County*, 8 P. C. L. J. 813, and the demurrer to the petition is overruled.

McKEE, J., dissenting:

I dissent. The case, as presented by the record, is this: On the seventh of January, 1882, the petitioner, being County Clerk of Plumas county, and *ex-officio* Clerk of the Board of Supervisors and Auditor of the county, issued to himself, under the provisions of an Act of the Legislature entitled "An Act to regulate fees of office and salaries of certain officers," etc., approved March 5, 1870, a warrant for his salary as Clerk of the Board of Supervisors for the month of December, 1881. Upon presenting the warrant to the Treasurer of the county for payment, payment was refused on the ground that the Act of 1870 had been repealed. That Act had been, in fact, repealed by an Act entitled "An Act in relation to certain officers in Plumas County, and to fix the compensation thereof," approved March 6, 1878, but the repealing Act was not to take effect until the first Monday in March, 1880. Meanwhile, the Constitution of 1879 was adopted by the people of the State, and went into effect at twelve o'clock

1. *Whiting v. Plumas Co.*, 64 Cal. 66; *People v. Whiting*, 64 Cal. 68.

M. of the first day of January, 1880, and the question arises, What effect did the adoption of the Constitution have upon these two legislative enactments?

By Subdivision 1, Section 5, Article xi, the Constitution made it the duty of the Legislature to provide, by general and uniform laws, for the election, in the several counties of the State, of such county officers as were required by law, including County Clerk and other officers, and prescribe their duties and fix their terms of office. Legislation to enforce this section of the Constitution was, therefore, necessary. At the time the warrant in controversy was drawn, such legislation had not been had. And according to Section 1, Article xxii, all laws repugnant to the provisions of the Constitution, which required to be enforced by legislation, were repealed on the first of July, 1880, if not sooner altered or repealed by the Legislature; while all laws in harmony with the provisions of the Constitution remained in "full force and effect," undisturbed by the adoption of the Constitution. The Act of 1870, being in force when the Constitution was adopted, was consistent or inconsistent with the provisions of the Constitution. If inconsistent, the Act expired by limitation on the first of July, 1880. If consistent, its existence and force were neither disturbed nor affected by the Constitution. It is manifest that the people in adopting the Constitution intended not to cause any inconvenience to, nor to disturb in any way, the order of things as it existed in the State, by the alterations and amendments of their organic law, except so far as it might be affected by the amendments themselves. This is clearly expressed by Section 1, Article xxii. of the Constitution: All the institutions of the State, all rights of person and property, and all existing laws, under and by which institutions existed and rights were protected, were left unchanged—just as though the Constitution had not been amended, except as to the effect which the amendments had upon them. Some of the former Courts were abolished; others with new names, were created and substituted for the former, in such a way as not to obstruct nor derange the judicial machinery of the State, nor to cause the slightest interference with judicial records, books, papers, and proceedings in courts. All writs, prosecutions, actions, and causes of action, all indictments or

informations which may have been found for any crime or offense which had been committed, were left pending, to be "proceeded upon as if no change had taken place, except as otherwise provided."

All recognizances, obligations, and other instruments, entered into and executed to the State, or to any municipal part of it; and all fines, taxes, penalties, and forfeitures due or owing to the State, or any subdivision or municipality thereof, were continued unimpaired and unaffected by the Constitution. All rights, actions, prosecutions, claims, and contracts of the State, counties, persons, or bodies corporate, were continued, clothed with their original validity "as if the Constitution had not been adopted." And all laws in force consistent or inconsistent with its provisions were kept alive, until altered or repealed by the Legislature, except that inconsistent laws were repealed, to take effect on the first of July, 1880, if not sooner repealed by legislative enactment. (§§ 1, 2, 3, Sched.) So that, here and there, the Constitution of 1863 was altered and some of its sections amended. Some old Courts were abolished, and others, with new names, were substituted for them. But the State was still the same, still retained its republican form of government, and lived, moved, and had its being, under laws which had been passed by former Legislatures, and were in existence when the Constitution of 1879 was adopted. Now the Act of 1870 fell within the category of laws consistent with the provisions of the Constitution which required to be enforced by legislation; therefore, it continued to operate as law with the same force and effect that it had when the Constitution was adopted. Such as its force was then, and not otherwise, it was recognized and continued.

Now the force of law, at any time, is to be estimated by its nature and power as affected by any legislative enactment upon the subject-matter to which it may relate, and which may give it a determinate existence. In this way the Act of 1870 was affected by the Act of 1878, for the latter limited the existence of the former to the first Monday in March, 1880, at which time the last Act, as a repealing law, was to take effect. At the adoption of the Constitution both laws co-existed in harmony with the Constitution as it was at the

time of their passage; and, being constitutional co-existing laws dictated by the same policy, having in view the attainment of the same ends and relating to the same subject-matter, they should be considered and construed as one statute.

So considered, the two acts clearly expressed the legislative will on the subject of official salaries in Plumas County; but as the existence of the one was limited by the provisions of the other, the one died when the other took effect, and from that time the right to collect fees, etc., in the county was regulated, not by the dead law, but by the repealing law, which continued, from the time it took effect, as the law of Plumas County, until the Legislature by its action enforced the provisions of Subdivision 1, Section 5, Article xi., of the Constitution. Can it be doubted, if the Constitution under which the statutes were passed had not been amended at all, that the Act of 1870 would have ceased to exist on the first Monday in March, 1880, and that the Act of 1878 would have taken effect at that time? Yet such was the situation; for the Constitution did not affect any former legislative enactments consistent with its provisions. The statute of 1878 was as consistent with the provisions of the Constitution as was the statute of 1870. Neither was expressly repealed, nor was either repealed by implication. Repeals by implication are not favored in the construction of the Constitution or statutes. Both, therefore, existed, with whatever force was imparted to them by their creator, just as though the Constitution under which they were passed had not been amended. The life of the one, and the suspension of the other, ended on the day fixed by law. The Act of 1878 was therefore the law of the question involved in the case at the time when the warrant in controversy was drawn; and, as the warrant was drawn under the Act of 1870, which had ceased to exist, it was invalid and void. Therefore the demurrer should be sustained.

[No. 6,922.—In Bank.]

May 29, 1882.

CHARLES B. YOUNGER v. EDWARD PAGLES ET AL.**EJECTMENT—MEXICAN GRANT—SURVEY UNDER THE ACT OF JUNE 14, 1860—**

FINAL CONFIRMATION—APPEAL—PRESUMPTION—JURISDICTION OF UNITED STATES DISTRICT COURT—STATUTE OF LIMITATIONS—PATENT—PRE-EMPTION.—In an action of ejectment, the facts as found by the Court were in substance as follows: The land in controversy is within the limits of a Mexican grant to the predecessors in title of the plaintiff, approved by the Departmental Assembly, and of which the juridical possession has been delivered. The claim was duly presented and confirmed by the Land Commissioner and the United States District Court. An appeal was taken to the Supreme Court, but afterwards (in the year 1857), the District Court made an order dismissing the same. In the year 1858, the grant was surveyed by the United States Surveyor General, so as to include the premises in controversy; but in 1861, the survey not having been previously approved, the Surveyor General altered the northern boundary of the survey, so as to exclude it. The survey so corrected was approved, and advertised in accordance with the provisions of the Act of June 14, 1860; and no objection was made to the survey until the sixteenth day of June, 1869, when it was again advertised under the provisions of the Act of July 2, 1864; and objections were made by the owners of the grant, which were still pending, when the suit was brought. The defendant P. entered upon the land in controversy on the ninth day of January, 1860, and has since held the adverse possession. On January 10, 1868, a patent issued to one Henry P., as a pre-emptor, for a portion of the land, who conveyed the same to the defendant P.; to whom also, on May 2, 1870, a patent issued for the balance of the land. The action was commenced on the fifteenth day of April, 1868.

Held: 1. The case does not show that the claim to the ranch in question has been finally confirmed by the authorities of the United States. The order of the District Court dismissing the appeal was absolutely void, if the appeal to the Supreme Court was pending when the order was made, and the conclusive presumption is that the appeal is still pending, in the absence of a direct finding to the contrary; 2. The action having been commenced at a date less than five years after the passage of the Act of April 18, 1863, the plaintiff is not bound by the Statute of Limitations.

APPEAL by plaintiff from a judgment for defendant Pagles in the Twentieth District Court of the County of Santa Cruz. **BELDEN, J.**

The judgment was reversed.

Charles B. Younger, for Appellant.

The ranch could not be surveyed pending an appeal from the decree of the United States District Court for the South-

ern District of California, confirming the claim to said ranch. The appeal gave the United States Supreme Court jurisdiction in the premises, and, pending such appeal, the United States District Court, if it otherwise had jurisdiction of the cause, was ousted of all jurisdiction therein. (*McGarrahan v. New Idria Mining Co.*, 49 Cal. 33.)

The order of the District Court, dismissing the appeal, was void. (*Penhallow v. Doane's Administrator*, 3 Dallas, 54; *Woodbury v. Bowman*, 13 Cal. 634; *Covarrubias v. Board of Supervisors*, 52 id. 622; *Thornton v. Mahoney*, 24 id. 569.) While this appeal was pending, the claim to said ranch had not been finally confirmed; and, under said Act of March 3, 1851, no survey of this ranch could be made until final confirmation.

The premises in suit were not subject to pre-emption; and the patents issued on pre-emption claims to Henry Pagles and defendant Pagles, are void. (*Stoddard v. Chambers*, 2 How. 284; *Easton v. Salisbury*, 21 id. 426; *Morton v. Nebraska*, 21 Wall. 660; *Best v. Polk*, 18 id. 112; *Sherman v. Buick*, 93 U. S. 209.)

This action was commenced in time. The complaint was filed on April 15, 1868, and this was prior to the expiration of the time allowed by the amendments of April 18, 1863, to said statute. (Statutes 1863, p. 325; *Palmer v. Low*, 98 U. S. 17.)

Joseph H. Skirm, for Respondent.

On February 5, 1861, the survey, corrected and platted, received the approval of the Surveyor-General; and the survey then became a complete survey, and not before. (*Medley v. Robertson*, 55 Cal. 396, overruling *Oakley v. Stuart*, 52 id. 521; Act of Congress, June 14, 1860; Brightly's Digest, 1133; *United States v. Sepulveda*, 1 Wall. 104.) That the publication was regular is beyond question.

No objection to the survey was made within that time, and it then became finally determined, and the equivalent of a patent by the last clause of Section 5 of said Act. (*Galagher v. Riley*, 49 Cal. 477.)

Every presumption is in favor of the action of the District Court, and it will be presumed to be regular until the con-

trary is affirmatively shown. There is no finding that the appeal is still pending, and the order of the District Court may have been made upon the mandate of the Supreme Court directing the dismissal of the appeal for want of prosecution filed in the District Court.

The Act of Congress of 1864, to settle California titles, did not destroy the validity and effect of the publication of the approved survey in 1861. That survey had the same force as a patent and passed the legal title to the land, and the United States had no more right to annul that title than any private owner of land who had conveyed it. (*Moore v. Robbins*, 96 U. S. 530.)

The approved survey became final in March, 1861, and having the validity and effect of a patent, the statute began to run from that time.

McKINSTRY, J.:

1. The case does not show that the claim to the Rancho Arroyo del Rodeo has been finally confirmed by the authorities of the United States. The Court below found: "On the seventh day of March, 1856, the United States, by the regularly authorized District Attorney, gave regular notice of appeal, upon the part of the United States, from the decision and decree of said District Court to the Supreme Court of the United States. And said cause was regularly appealed by the United States from the said District Court to the Supreme Court of the United States. That thereafter and upon the — of —, 1857, at a subsequent term of said United States District Court, the said *District Court* of the United States made an order that said appeal *was thereby dismissed*, and the said claimants had leave to proceed as upon the final decree."

The order of the District Court was absolutely void if the appeal to the Supreme Court was pending when the order was made, and the conclusive presumption is, that the appeal is still pending, in the absence of a direct finding to the contrary. (*McGarrahan v. New Idria Co.*, 49 Cal. 381.) There is no finding that the appeal has ever been dismissed, or that any disposition has been made of it in the Supreme Court.

Nor can we resort to any presumption to help out the de-

fective finding so as to make it sufficient to sustain the judgment. The order of the District Court does not recite or refer to any remittitur or mandate of the Supreme Court of the United States or pretend to assert that an order of dismissal had been made in the latter Court. No law of the United States has been called to our attention, or any practice in the Federal Courts, showing that such an order of the District Court followed, in the usual course, the dismissal of the appeal in the Supreme Court. The order does not purport to rest upon any previous action of the appellate tribunal, but implies, by its very terms, the exercise of an inherent and independent jurisdiction to put an end to the appeal and make final the judgment already entered. To hold that the order of the District Court conclusively proves that the appeal had been dismissed, is to overthrow the presumption arising from the fact that the appeal had been taken, and by means of a new presumption, to inject into the order a meaning entirely different from that which is expressed by its unambiguous language. Even if the order of the District Court can be treated as *evidence* tending to prove that the appeal had been dismissed, yet, as it does not conclusively establish the dismissal, the finding of the probative fact can not be substituted for a finding of the ultimate fact. (*Coveny v. Hale*, 49 Cal. 552.)

2. The plaintiff is not barred by lapse of time. The action was commenced at a date less than five years after the passage of the Act of April 18, 1863. (Statutes of 1863, p. 325.) The sixth section of that Act reads: "The time that shall have already run under the act of which this is amendatory, when this Act takes effect, shall be taken and computed as a portion of the time in this Act limited for the commencement of an action, or the making of a defense thereto; * * * provided, that any person claiming real property, or the possession thereof, or any right or interest therein, under title derived from the Spanish or Mexican Governments, or the authorities thereof, which shall not have been *finally confirmed* by the Government of the United States, or its legally constituted authorities, *more than five years* before the passage of this Act, may have five years *after* the passage of this Act in which to commence his action for the recovery of such real

property, etc.; and, *provided* further, that nothing in this Act contained shall be so construed as to extend or enlarge the time for commencing actions for the recovery of real estate, or the possession thereof, under title derived from Spanish or Mexican Governments, *in a case* where final confirmation has already been had, *other* than is now allowed by the act to which this Act is amendatory." (Act of April 11, 1855.)

The seventh section of the Act of 1863 defines "final confirmation" within the meaning of the Act, and declares that final confirmation "shall be deemed to be the *patent* issued by the Government of the United States," or "the final determination of the official survey" under the provisions of the Act of Congress approved June 14, 1860.

There can be no misapprehension of the language employed in the first of the two provisos above recited. Every person claiming under a Spanish or Mexican grant or title, was given full five years after the Act of 1863 took effect, to bring his action, unless the grant or title was "finally confirmed" more than five years before the Act of 1863 took effect.

There is nothing in the other proviso which necessarily derogates from or destroys the effect of the first, upon a title in the condition of that of the plaintiff. The ordinary time within which must be brought an action for the recovery of real property, or its possession, is five years. The second proviso declares that this time shall not be extended by the Act of 1863, in any case in which it would not be extended by the Act of 1855. But by the Act of 1855 the time was extended in every case until a *patent* should issue. (*Johnson v. Van Dyke*, 20 Cal. 225; *Davis v. Davis*, 26 id. 46; *Beach v. Gabriel*, 29 id. 580.) No patent has ever been issued to plaintiff, or his grantors. Hence, by holding that by virtue of the first of the provisos quoted from the sixth section of the Act of 1863, the time for plaintiff to bring his action was extended for five years from the taking effect of that Act, we do not construe the Act of 1863 as extending or enlarging the time in a case in which it was not allowed under the Act of 1855.

It is not our task to harmonize the provisos. It is enough to say that the first gave to the plaintiff five years to bring his action after the Act of 1863, and the second did not take the right away from him.

It follows, from what has been said, that, even if the claim to the rancho had been confirmed by final decree of the Supreme Court of the United States prior to the alleged publication of the survey under the Congressional law of 1860, the plaintiff would have five years to bring this action after the statute of the State, of 1863, took effect.

If a case presented the fact of a patent having been issued less than five years before the Act of 1863, it might be necessary to determine whether the time between the date of the patent and the Act of 1863 should be included as a part of the five years' limitation, notwithstanding the language of the first proviso, which gives to one to whom a patent has been issued within five years, five full years to bring his action, after the Act of 1863 took effect. But the question does not arise here, since no patent has yet been issued to the plaintiff.

There is, however, a conclusive answer to the suggestion, that the period of limitations began to run at the expiration of the publication of the survey in 1861. None of the Acts of Congress to which reference has been made authorize a survey, or segregation of lands granted by the Spanish or Mexican Governments until after the claim has been declared valid by the proper authorities of the United States.

ROSS, MCKEE, THORNTON, JJ., and MORRISON, C. J., concurred.

MYRICK, J., dissenting:

This is an action of ejectment, brought to recover possession of lands, claimed by plaintiff to be within the exterior boundaries of the Rancho Arroyo del Rodeo. The tract of land of which the plaintiff claims that juridical possession was given under the Mexican Government, included the lands in controversy, the grant being of a tract one quarter of a league in width, between the Arroyos del Rodeo and Soquel, and one league in length northward from the Bay of Monterey. The Land Commission confirmed the grant, and on appeal to the District Court of the United States, the grant was held valid to the extent of one league in length by one quarter of a league in width, within the boundaries above stated.

From this confirmation an appeal was taken to the United States Supreme Court, but it does not affirmatively appear that any action has been had in that Court. In 1857 an order was made by the District Court, that the appeal was thereby dismissed, and that the claimants had leave to proceed as upon final decree.

In 1858 a deputy United States Surveyor made a survey in the field, which survey included the premises in controversy. This survey was not approved; on the contrary, the United States Surveyor-General for California, in 1861, altered and corrected the northern boundary line of the rancho, as reported by the deputy surveyor, and caused a map to be plotted, upon which the northern line of the grant was laid down and run, and included no part of the premises in controversy. The survey, as thus altered and corrected, and the map thereof, were approved by the Surveyor-General February 5, 1861, and were by him placed on file in the records of his office; thereupon the said Surveyor-General, in 1861, gave notice of such survey, by publication, as required by the Act of Congress of June 14, 1860. Under this publication no objections were made to the survey, and no application was made to the District Court for any order. In 1869 the Surveyor-General, assuming to act under the Act of Congress of July 2, 1864, caused another notice of the survey to be published, and, under this last publication, objections to the survey were filed by the plaintiff and others; but at the commencement of this suit no other steps had been taken, nor had the Commissioner of the General Land Office acted in the premises; no patent had been issued, and, so far as appears, the survey still remained in the office of the Surveyor-General.

In 1853, plaintiff's grantors let one Rider into possession of the premises in controversy, under an agreement to occupy it for dairy purposes. Rider never surrendered possession of the premises to plaintiff's grantors, but on the ninth day of January, 1860, asserting himself to be the owner, and denying the right of the plaintiff's grantors to the same, and denying that the premises were or ever had been any part of the Rancho Arroyo del Rodeo, conveyed his interest therein to defendant Pagles, who then entered into possession of the whole of the premises in controversy, inclosed the same by a

substantial fence, and ever since has and still occupies the same for farming and agricultural purposes, residing thereon, and ever since such purchase he, Pagles, has been in the open, notorious, continued, undisturbed, and uninterrupted possession and occupation of the land, denying the title and claim of plaintiff to the same, and denying that any part thereof did belong or had belonged to said rancho, but asserting that the same was, until the date of the patents hereinafter mentioned, portions of the public domain of the United States, and that since the dates of such patents he is the owner in fee of the whole thereof. The patents above referred to are patents issued by the officers of the United States in 1868 and 1870, upon pre-emption claims made by said Pagles and another, and the title, if any, granted by said patents, is vested in the defendant Pagles.

The Court below rendered judgment in favor of the defendant Pagles, holding that "the approved survey of the United States authorities, until set aside, must, for all the purposes of this controversy, be taken as conclusively establishing the true lines of the grant, and until the same is corrected, modified, or set aside, must be held binding upon Courts and litigants." I think the Court below was correct. The approval of the survey and plat of February 5, 1861, by the Surveyor-General, and the publication of the notice (no objection being made thereto) was a confirmation of the grant to plaintiff's grantors, and determined the boundaries of the grant, at least for the purposes of this case, and plaintiff can not recover possession of the premises so long as it shall stand. (*Bernal v. Lynch*, 36 Cal. 144; *Seale v. Ford*, 29 id. 106.) The publication of the notice by the Surveyor-General in 1861—no objection having been made, or other proceeding had, in relation thereto—was a confirmation of the survey and an establishing of the lines of the grant. It had, under the Act of Congress of June 14, 1860, "the same effect and validity as if a patent for the land surveyed had been issued by the United States," and the plaintiff stands in the same position as he would if he had his patent. (*Seale v. Ford*, *supra*.) It seems that under the Act of Congress of July 2, 1864, the survey must be forwarded to the Commissioner of the General Land Office for his action; but the survey in this case had, under

the Act of June 14, 1860, become approved before the passage of the Act of 1864. The right to measure off and fix the lines of a grant rests with the political department of the Government. (*Moore v. Wilkinson*, 13 Cal. 486.)

The defendants' plea of the Statute of Limitations, too, is effectual to defeat this action. Reading the Acts of the Legislature of this State of April 11, 1855, and April 18, 1863, together, it appears that the right of defendant Pagles to retain possession until plaintiff shall, if he can, obtain a patent upon his grant, is clearly provided for; he is within the last proviso of Section 6 and within Section 7 of the Act of 1863. Under the Statute of Limitations of this State he had been in the possession of the premises more than five years, under an approved survey, before the republication made by the Surveyor-General; and such republication, and the objections filed thereunder, would not affect his right. We are aware of the decisions of the United States Supreme Court and of this Court, that where juridical possession has been delivered under a Mexican grant, the grantee may recover to the exterior lines of such possession and grant; the principle of such cases does not apply here. In this case the Government of the United States has performed its part of the treaty with the Mexican Government, and has, by its proper officer, in the method provided by law, ascertained the extent of the grant, and is, doubtless, ready to issue its patent when called for. It has ascertained in the method provided by law, that, even though juridical possession of the premises in controversy may have been delivered to the grantee, yet the grant, as confirmed, did not include the premises, and therefore the grantee took no title thereto. Under the decisions, the right of the grantee to maintain ejectment for all the lands within the limits of the juridical possession exists down to the time of establishing the limits of the grant by the United States Government; and when so established, the lines of the juridical possession must, of course, yield to the established lines. (*Chipley v. Farris*, 45 Cal. 528; *Mahoney v. Van Winkle*, 33 id. 448.)

I, of course, omit to give any consideration to the effect of the patents held by Pagles; because if plaintiff had any right or claim to the lands as belonging to his grant, Pagles' patents

were issued without authority of laws; on the other hand, if the survey became final, the land was a portion of the public domain and subject to pre-emption.

As to the point that an appeal was taken to the Supreme Court of the United States from the District Court, and that it does not appear that such appeal was ever dismissed by the appellate Court, it does not appear that the appeal was not dismissed, and as the District Court subsequently made an order authorizing the grantee to proceed as upon a final decree, and as proceedings were had, viz., a survey and approval, the law will, after such a lapse of time, presume that the District Court had before it an order of dismissal or a stipulation justifying its action, rather than that it acted without such order.

[No. 7005.—In Bank.]

May 29, 1882.

HELEN M. MOORE v. THOMAS W. MOORE,
ADMINISTRATOR ETC.

FAMILY ALLOWANCE—ESTATES OF DECEASED PERSONS—PAYMENT.—Upon an application of the widow to the Probate Court for an order to compel the administrator to pay over to her the amount due for family allowance under an order previously made, the Court found that the whole amount of the allowance had been paid; but among the amounts found was a sum paid by the administrator in satisfaction of a bond executed by him in his private capacity to the widow—the condition of which had been broken—and a further sum expended in pursuance of an agreement with the widow for the maintenance and education of three of the children who were at school.

Held: With regard to the latter item, the payment having been made for the maintenance and education of the children at the request of the widow, was equivalent to a payment to her; but with regard to the former, the administrator has no authority to apply funds in his hands appropriated by law for the support of the family of the deceased to the payment or satisfaction of his personal obligations; nor could he legally enter into any agreement or make any arrangement with the widow for its application in that way.

Id.—The family allowance is as much for the advantage of the children of deceased as for the widow, and it can not be affected by any agreement or understanding between the widow and the administrator, which would have the effect to deprive the children of it, or to divert it to any other use than that specified in the law. (MYRICK, J., dissenting.)

APPEAL by petitioner, Helen M. Moore, from an order of the Probate Court of the County of Santa Cruz, denying a new trial. CRAIG, J.

Charles B. Younger and Ferdinand J. McCann, for Appellant.

John C. Hall, for Respondent.

McKEE, J.:

W. H. Moore died at the county of Santa Cruz, in this State, on October 30, 1871, leaving surviving him his widow, the appellant in this case, and five children. The respondent, having been appointed administrator of the estate, qualified March 4, 1872. According to the inventory and appraisement which he filed, the estate amounted in value to fifty-one thousand seven hundred and three dollars. On April 29, 1874, the widow petitioned the Probate Court for a family allowance. On the hearing of the petition, an order was entered to the effect "that the sum of two hundred and fifty dollars in gold coin of the United States of America be, and the same is hereby allowed out of the said estate of said deceased for each and every month since the death of the said deceased, and until the close of the administration of said estate, for the support and maintenance of the said family of the said deceased."

On the twenty-eighth of July, 1877, the widow, complaining that the administrator had refused to comply with the order of the Court, except in part, applied for an order to compel the administrator to pay over to her for the support of the family, the moneys appropriated for that purpose which remained unpaid.

On the trial of the issues made by the petition and answer, the Probate Court found that the family allowance to the date of filing of the petition amounted to seventeen thousand six hundred and fifty dollars; that the administrator had paid to the petitioner personally, under the order of the Court, one hundred and twenty-five dollars per month up to the month ending June, 1877, amounting in all to eight thousand seven hundred and ten dollars; that on May 9, 1877, he also

paid to her the sum of six thousand dollars; and had expended for the tuition, board, clothing, and necessary expenses of three of the children who were sent to school, three thousand and ninety-seven dollars and eighteen cents, making in all the total of seventeen thousand eight hundred and seven dollars, paid and expended. Upon this finding judgment was entered denying the application of the petitioner. She moved for a new trial, which was denied, and from that order this appeal is taken.

The expenditures for the maintenance and education of the children, and the payment of one hundred and twenty-five dollars per month personally to the widow, were the result of an understanding and arrangement between her and the administrator as to the education and maintenance of some of the children out of the family allowance. By her consent, one of the children of the deceased was sent to school during a portion of the time, after the death of the deceased. Of the others, two were sent to school about a year before the filing of the petition, remained there for about a year, but afterward did not return to reside with the petitioner, and the other two were under the personal care and control of the petitioner. Under the arrangement as to the payment of the family allowance, the widow received and accepted from the administrator the one hundred and twenty-five dollars per month as sufficient for the needs of herself and the two children under her personal supervision; and the balance of the allowance, with her approval and by her direction, was expended by the administrator for the maintenance and education of the three children who attended school.

As the widow, under those circumstances, undertook to educate and maintain the three children out of the family allowance, payment, by the administrator, for that purpose, at her request, out of the family allowance, was equivalent to a payment to her. In directing or authorizing the administrator to apply any portion of the money, as it became payable under the order, to the educational expenses of the children, she constituted him her agent for that purpose; and in accounting for moneys paid under the order, he was entitled to such expenditures as a credit. The Court below, therefore, correctly found that the administrator had complied with the

order of the Court to the amount of eleven thousand eight hundred and seven dollars.

But the finding that the administrator had paid, under the order, the additional sum of six thousand dollars, on the ninth of May, 1877, is not sustained by the evidence. There is no conflict in the evidence which establishes the fact that these six thousand dollars were paid by Thomas W. Moore on the ninth day of May, 1877, in satisfaction of a bond which had been executed by Alexander Moore, Thomas W. Moore, and John N. Bessie, about a month after the death of the intestate, and about five months before the appointment of Thomas W. Moore as administrator of the estate. That bond was given to guarantee the widow of the deceased in the payment of a policy of life insurance on the life of her husband, payable in the sum of five thousand dollars to her in the event of his death. The condition of the bond was as follows: "That said bond should be void if the insurance company should pay said policy of five thousand dollars to appellant, or if said appellant should receive from Thomas W. Moore, as executor of the last will and testament of said deceased, out of the funds of the estate of said deceased, or from the property of said estate, within fifteen months from the date of such bond, the sum of five thousand dollars, with interest thereon at one per cent per month, from January 1, 1872, to the date of such payment."

Satisfaction of the bond was made by the personal check of Thomas W. Moore for four thousand five hundred dollars, and his promissory note for one thousand five hundred dollars, payable to the widow one year after date. Upon receipt of the check and note the bond was surrendered to Thomas W. Moore; and *that* is the transaction which the Court below finds constituted payment to the widow of six thousand dollars upon the family allowance, because she consented to receive it in that way.

But it is evident that the two things are separate and distinct in their natures. The one is a judgment appropriating a certain monthly sum from the estate of an intestate for the support of his family. The other is a personal guaranty for the payment of a policy of life insurance, by the company

that issued the policy, or by the estate of the deceased. The obligation arising from the order is official; that arising from the guaranty personal. In his official capacity the respondent, as trustee, was bound to obey the order of the Court. He had no authority to apply funds in his hands appropriated by law for the support of the family of the deceased, to the payment or satisfaction of his personal obligations.

Nor could he legally enter into any agreement or make any arrangement with the widow or any one else interested in the fund, for its application in that way. Such an arrangement would be subversive of the policy of the law, which appropriated the fund for the support of the family of the deceased, and void. Therefore, the consent of the widow, if such consent had been given, that the personal obligation of the administrator might be satisfied out of the family allowance, would not make valid what the law pronounces void. The allowance is as much for the advantage of the children of the deceased as for the widow, and it can not be affected by any agreement or understanding between the widow and the administrator which would have the effect to deprive the children of it, or to divert it to any other use than that specified in the law. (*Strawn v. Strawn*, 53 Ill. 263; *Phelps v. Phelps*, 72 id. 545.)

Order denying new trial reversed, and cause remanded for further proceedings.

MORRISON, C. J., and THORNTON and MCKINSTRY, JJ., concurred.

MYRICK, J.: I dissent.

[No. 7,000.—Department Two.]
May 30, 1882.

ANNIE DALEY ET AL. v. J. A. CUNNINGHAM ET AL.

PARTIES—JOINDER OF PARTIES—ACTION—TRUSTEE—BOND.—The defendant, C., entered into a contract with the plaintiff, D., for the construction of a building upon a lot belonging to them, upon which the plaintiff, the Savings and Loan Society, held a mortgage; and for the faithful perform-

ance of the contract, C. and the other defendants as sureties gave their bond to the Savings and Loan Society, for the benefit of all the plaintiffs. *Held* (in an action for a breach of the bond): The plaintiffs were properly joined.

APPEAL from a judgment for the plaintiffs and from an order denying a new trial in the Nineteenth District Court of the City and County of San Francisco. WHEELER, J.

Action by Annie Daley and John H. Daley, her husband, and Savings and Loan Society against J. A. Cunningham *et al.* The complaint alleged that the plaintiffs Daley on the sixth day of June, 1874, executed a mortgage upon certain premises to the Savings and Loan Society to secure a promissory note, etc.; that on the tenth day of June, 1874, the defendant Cunningham entered into a written contract with the plaintiffs Daley to construct a building on the mortgaged premises; that at the same time, and in consideration of the said contract, the said Cunningham, as principal, and the other defendants, as sureties, executed and delivered to said Savings and Loan Society, for the benefit of plaintiffs, their certain bond, etc.; * * * that said bond was upon the express condition, thereunder written, that if the said Cunningham should well and truly complete his said contract, should save, harmless and fully indemnified, the said Annie and John H. Daley and the said Savings and Loan Society of and from all liens, claims, and demands arising or growing out of the furnishing of the material and labor for said buildings, then the said obligation should be void; otherwise that the same should remain in full force and virtue; that the defendant Cunningham failed to perform his contract, and that plaintiffs had been damaged thereby in the sum of six thousand dollars.

J. E. McElrath, for Appellant.

The demurrer should have been sustained for misjoinder of plaintiffs. The Daleys were the real parties in interest, and could alone sue on the bond. (§ 367, C. Civ. Proc.; *Baker v. Bartol*, 7 Cal. 551; *Summer v. Farrish*, 10 id. 347.)

A. N. Drown, for Respondent.

The demurrer for misjoinder of parties plaintiff did not lie. Both the Savings and Loan Society and the Daleys were

real parties in interest. The building contract, the performance of which was secured by the bond, was entered into by the Daleys alone, but the money, as we have seen, was to be paid by the Savings and Loan Society, whose security for repayment was a mortgage upon the land and buildings, which security would of course suffer by a non-completion of the improvements. Accordingly, the bond was executed to the Savings and Loan Society for the benefit of itself and the Daleys, and for the protection of both. (C. C. P. §§ 378, 382, 389.)

The Savings and Loan Society was, to a certain extent, that is, so far as it held the bond for the benefit of others, a trustee of an express trust—"a person with whom or in whose name a contract was made for the benefit of another," (Code Civ. Proc. § 369); it might perhaps, have sued without joining with it "the person for whose benefit the action is prosecuted." But it was not compelled to do so. (Bliss on Code Pleading, §§ 52, 61, 73 and 75; Story's Eq. Pl. 7 ed. §§ 72, 207, 218, 219.)

The COURT :

We do not think there was any misjoinder of parties plaintiff in this cause (C. C. P., 382), and are of the opinion that the demurrer on that ground was properly overruled.

We find no error in the record, and the judgment and order are affirmed.

[No. 7,251.—In Bank.
May 30, 1882.]

JOSE AURRECOECHEA v. DUNCAN SINCLAIR ET AL.

PATENT—CONSTRUCTIVE TRUST—REVIEW OF DECISION OF LAND OFFICERS—PURCHASER IN GOOD FAITH—COMPLAINT—LEGAL CONCLUSIONS—CERTIFICATE OF PURCHASE—EVIDENCE—RIGHT OF PRE-EMPTION UNDER THE ACT OF JULY 23, 1866.—In an action by the assignee of a purchaser from the State under an invalid selection—claimed to have been confirmed by the Act of Congress of July 23, 1866, "to quiet land titles in California"—against a pre-emption claimant, to whom, after a contest before the Land Department, a patent had been issued—the object of the action being to have the defendant adjudged a trustee of the legal title for the plaintiff—

the complaint alleged that on the contest the commissioner "found as a matter of fact, that in the year 1863, the State of California selected and located said land under the laws of said State, and did thereafter sell and dispose of the same to the grantor of the plaintiff, as is hereinbefore more fully stated; and that on the seventeenth day of February, 1864, the grantor of the plaintiff became the purchaser in good faith of said land from the State under her laws—paid the purchase price and received a certificate of purchase therefore as hereinbefore stated;" * * * that the only objection made to said claim, on said contest and investigation, and the only objection which has ever existed thereto, was the fact that said land so selected and located as aforesaid was embraced by said exterior boundaries of the Mexican grant "Las Pocitas." * * * that said contest and investigation was had long after said tract of land in question had been forever excluded from any claim under said Mexican grant;" and that the decision of the commissioner and of the Secretary of the Interior was based solely on this mistake of law; but it did not appear from the allegations of the complaint that the plaintiff's grantors had complied with the laws of the State so as to constitute them *bona fide* purchasers except so far as this might appear from the general averment that they were purchasers in good faith and that a certificate of purchase had issued to them; nor was it alleged that the plaintiff himself was a *bona fide* purchaser from his assignors.

Held: The complaint was fatally defective in not alleging the facts essential to constitute the plaintiff's grantors purchasers in good faith from the State. The general averment that they were such purchasers was an averment of a conclusion of law only. The certificate of purchase, having been issued for land not subject to location, and being consequently void, was not competent evidence of the purchase. The complaint was also defective in not alleging that the plaintiff himself was a purchaser in good faith from his assignors. Inferentially he became the owner of the certificate after the decision of the Land Department, and assuming this to be the fact, he bought with notice of the possession of the defendant, of the judgment in his favor, and of the issuance of the patent, and was therefore not a *bona fide* purchaser from the State within the meaning of the Act. The complaint was also defective in not alleging that the land, in lieu of which it was alleged the land in dispute was selected, had been lost to the State.

APPEAL from a judgment for the defendant in the Third District Court of the County of Alameda.

The judgment was on demurrer to the complaint, which was as follows:

The plaintiff, Jose Aurrecochea, for cause of action against the above-named defendants, avers and shows to said Court the following facts, to wit:

I. That the plaintiff is ignorant of the names of certain defendants herein, and has designated such defendants by the

names of John Doe and Richard Roe. That heretofore, to wit, in the year 1863, the State of California, by its proper officer, to wit, the State Locating Agent, and in pursuance and under and by virtue of the laws of said State, and in part satisfaction of the grant by the United States to said State of the sixteenth and thirty-sixth sections of land in each township in said State, or other lands in lieu thereof, under an Act of Congress, entitled "An Act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March 3, 1853, selected and located the following described land, viz.: The north half of the southeast quarter of section 7, township 3 south, range 3 east, Mount Diablo Meridian, in the County of Alameda, State of California, containing eighty acres of land, more or less. That said land was so selected and located by the State of California, in lieu of and as indemnity for certain sixteenth and thirty-sixth sections of lands in said State, or portions thereof, which had become lost to said State under the terms and conditions of said Act of Congress aforesaid.

II. That thereafter, on the seventeenth day of February, 1864, the State of California, under and in pursuance of the laws of said State in that behalf made and provided, sold said tract of land so selected and located as aforesaid, and the plaintiff and his grantors became and were the purchasers of said land in good faith from the State of California, and then and there paid to said State the purchase price therefor, pursuant to the law of the State; and then and there the State of California, by its proper officer, to wit, the Register of the State Land Office, issued and delivered to the grantors of the plaintiffs, pursuant to the law of the State, a certificate of purchase of said land. That in or about the year 1865, the grantor of the plaintiff, under and by virtue of said purchase and said certificate of purchase, entered into and upon said tract of land, and thereafter held and enjoyed the actual possession thereof until he was ousted therefrom by the defendants, as hereinafter more fully shown.

III. That prior to the year 1866, the State of California had, in the manner aforesaid, selected and located a large amount of land in said State in part satisfaction of grants by

the United States to said State, and had, in pursuance of the laws of said State, sold said land to purchasers in good faith under said laws; that many of such selections and locations were believed to be irregular and invalid under the laws of the United States by reason of the defective legislation and action on the part of the State in the selection and disposal of said lands; and the selection and location of the land hereinbefore described and sold to the grantor of the plaintiff, was one of such irregular selections and locations.

That for the purpose of furnishing relief to all such *bona fide* purchasers of lands from the State, and for the purpose of furnishing them with the means and opportunity of perfecting their said purchases and acquiring the legal title to the lands so as aforesaid purchased by them from the State of California, and at the request of said State, through its Legislature, the Congress of the United States did, on the twenty-third day of July, 1866, pass an Act entitled "An Act to quiet land titles in California."

That the township embracing the tract of land hereinbefore designated and described, was surveyed in the field by the Surveyor General of the United States for the State of California, and by him sectionized and subdivided in the year 1862; that thereafter, and in the same year, he constructed such survey and delineated the same into and upon a township plat, and approved such survey and plat and caused a duplicate of such township plat so made and approved as aforesaid by him to be filed in the General Land Office of the United States at Washington, and in the office of the said Surveyor-General at San Francisco; and as the plaintiff is informed and verily believes, the said Surveyor-General at the same time, to wit, in the year 1862, also caused a duplicate of such township plat and survey to be filed in the local Land Office, in the district embracing said land, to wit, at San Francisco; that such township plat was afterward, and after said State selection and location had been made, by some person unknown to the plaintiff, withdrawn and removed from said local Land Office, but was afterwards, and on or about the first day of July, 1871, returned and filed in said local Land Office, where the same has since remained and is now on file.

IV. That long prior to said last-named date, the plaintiff, and those under whom he claims said land, had presented said State selection and location, and the claim and title to said land thereunder, to the Register and officers of said local Land Office of the United States, and said officers had full and particular notice thereof; and said selection and location was by said Register noted and entered in writing upon the tract book of said local Land Office, and the same was also entered upon and noted in writing upon the tract books of the General Land Office of the United States, at Washington; that such notice and presentation was made and noted and entered in said tract books, as aforesaid, some time in the year 1866.

That said Register of the local Land Office, and the Commissioner of the General Land Office of the United States had full knowledge of all the facts herein stated in relation to said location and selection and sale by the State, and of the purchase of said land by the grantor of the plaintiff, from and after the date of such presentation and notice and entry as aforesaid, but neglected to take any action thereon, on account of the delay in the final settlement of the survey of that certain Mexican grant called "Las Pocitas," as herein-after more particularly mentioned.

V. That on or about the twenty-fourth day of September, 1870, the defendant Duncan Sinclair, with full knowledge of the claim and title of the plaintiff to said land as herein stated, and while the plaintiff, or those under whom he claims, was in possession of said land as aforesaid, did enter into and upon said land, and did oust the plaintiff and those under whom he claims therefrom, claiming the right to pre-empt said land under the general pre-emption laws of the United States. That on the twenty-sixth day of June, 1871, said defendant Sinclair filed in the local Land Office of the United States a declaratory statement of his intention to pre-empt said land.

VI. That some time prior to the year 1860, one Robert Livermore and another had obtained the final confirmation in their names, under the laws of the United States, of that certain Mexican grant called "Las Pocitas," that in the final decree of confirmation the land designated and described as belonging to said grant is stated as follows: "The land of which

confirmation is hereby made is known as *Las Pocitas*, and is bounded and described as follows, to wit, on the north by the *Lomas de las Cuevas*, on the east by the *Sierra de Buenos Ayres*, on the south by the dividing line of the establishment of *San Jose*, and on the west by the rancho of *Don Jose Dolores Pacheco*, containing in all two square leagues, a little more or less, provided that quantity be contained within the boundaries named, and if less than that quantity be contained therein, then that less quantity is hereby confirmed."

That as a matter of fact, the area of land embraced by the above-named boundaries is from ten to twelve square leagues, and embraces the greater portion of the land in the place known as the *Livermore Valley*, in said *Alameda County*, and said exterior boundaries embrace the land in controversy in this action.

That in the year 1869, the Surveyor-General of the United States, for the State of California, made an official survey of said grant, which purported to segregate all the land rightfully belonging to said grant—"Las Pocitas"—which survey embraced about two square leagues of land; that such survey became the final survey of said grant by the approval of the same by the Secretary of the Interior of the United States, on the sixth day of June, 1871, and a patent was issued by the United States, embracing the land contained in said survey—which patent was received by the claimants under said grant in full satisfaction thereof—and that such survey and patent does not embrace any portion of the land in controversy in this action.

That after the plat of survey of said township, embracing the land in controversy, had been returned to said local Land Office as aforesaid, on the first day of July, 1871, and within three months thereafter, the plaintiff, and those under whom he claims, being the purchasers of said land, and claiming the same under said State's selection and location, again presented said claim and fully proved up such purchase and claim, so far as the facts were concerned, to the satisfaction of the Commissioner of the General Land Office of the United States.

That at the same time said defendant French contested the claim of the plaintiff aforesaid before the officers of the Land

Departments of the United States, claiming the right to pre-empt said land as before stated; that upon such contest and investigation said Commissioner found, as matter of fact, that in the year 1863 the State of California selected and located said land under the laws of said State, and did thereafter sell and dispose of the same to the grantor of the plaintiff, as is hereinbefore more fully stated; and that on the seventeenth day of February, 1864, the grantor of the plaintiff became the purchaser in good faith of said land from the State under her laws, paid the purchase price, and received a certificate of purchase therefor, as hereinbefore stated. And said Commissioner found generally all the facts the same as they are stated in this complaint; and thereupon said plaintiff, and those under whom he claims, submitted said claim to said Commissioner, and asked that said land be certified over to the State of California, pursuant to said Act of Congress, entitled "An Act to quiet land titles in California."

That the only objection made to said claims on said contest and investigation, and the only objection which has ever existed thereto, was the fact that said land so selected and located, as aforesaid, was embraced by said exterior boundaries of the Mexican grant, "Las Pocitas," and that it was part and parcel of said ten or twelve square leagues aforesaid; that said contest and investigation was had long after said tract of land in question had been forever excluded from any claim under said Mexican grant, and at a time when the same was subject to disposition by the Commissioner aforesaid, as other public lands of the United States.

That upon such issue and question of law alone, the Commissioner of the General Land Office of the United States, and the Secretary of the Interior of the United States, both held and decided upon their construction of the said Act of Congress of July 23, 1866, that said land and claim was excluded from the operation and effect, and from the remedial and confirmatory provisions, and all the provisions of said Act of Congress, and solely because of the fact, and for no other reason than the following, to wit: because said land had been embraced by the exterior boundaries of said Mexican grant, and held or claimed under said grant until the sixth day of June, 1871; and thereupon and for that reason and no

other, said Commissioner of the General Land Office of the United States refused to approve said claim and refused to certify said land over to the State of California, but rejected said claim, and then and there awarded said land to the defendant, French, in virtue of his pre-emption claim aforesaid, and made an order permitting said French to enter said land under said pre-emption claim.

That afterward, and in pursuance of said decision, said French was permitted to, and did enter said land, and on or about the fifteenth day of August, 1876, in pursuance of said entry and decision, said Commissioner caused a patent of the United States to be issued and delivered to said defendant, Earl B. French, for said land—which patent transferred the title of said land to said French.

The plaintiff avers that the decision of the Commissioner and Secretary of the Interior aforesaid was and is contrary to law, and that in making such decision said officers were mistaken in the legal construction of said Act of Congress; that if said officers had decided said matter according to law, said selection and location and claim of the plaintiff would have been approved, and the land would have been certified over to the State of California pursuant to said Act of Congress of July 23, 1866, and the plaintiff would have been enabled to and would have acquired the legal title to said land under the laws of the United States and said State of California; that by reason of the acts of the defendant Sinclair as aforesaid, and the mistake of said officers as aforesaid, the plaintiff has been forever prevented and disabled from perfecting his title to said land under the laws of the United States and the laws of the State of California, to his great wrong and injury.. That said plaintiff is now the owner and holder of said certificate of purchase of said land from the State of California, and the equitable owner of said land hereinbefore described as hereinbefore stated.

IX. That the other defendants named in the title of this complaint have, or claim to have, some interest in, or claim to, said land, holding, or claiming to hold, the same under or through said defendant, Earl B. French, as the plaintiff is informed and verily believes; but what the nature or character of such interest or claim is, the plaintiff is not fully in-

formed, and is therefore unable to state more fully than as aforesaid.

Wherefore the plaintiff prays that all of the defendants above named may be required to appear in this action and answer this complaint, and set forth fully the nature of their interest in or claim to said land. That it may be adjudged and decreed by this Court that the plaintiff is the equitable and rightful owner of said land, and that the legal title to the same now held by the defendant, Earl B. French, or either of the defendants herein, is so held in trust for the plaintiff. That it be further adjudged and decreed by the Court that the defendants convey said legal title to said land to the plaintiff herein, and that the legal title to said land may be conveyed to the plaintiff by said defendants, or by a Commissioner duly appointed by this Court, and that the plaintiff may have such further or other relief as may be meet and proper and agreeable to equity and good conscience, and may have and recover the costs of this action.

Duly verified.

H. F. Crane and Edward J. Pringle and Sidney L. Johnson, for Appellants.

Upon the facts stated in the complaint, the claim of the appellant should have been approved, and the land should have been certified over to the State, under the Act of Congress of July 23, 1866. (2 Lester. 180; *Huff v. Doyle et al.*, 93 U. S. 558.)

The case upon the complaint shows that upon the same state of facts as in the case above cited, the officers of the Land Department were mistaken in their construction of the Act of Congress, and thereby the appellant was denied a right to which, under the law, he was entitled. Where the officers of the Land Department have, by a mistake of law, given the title of land to one party which should of right have been given to another, a Court of equity will give relief, such as is prayed for herein. (*Johnson v. Towseley*, 13 Wall. 73; *Lindsey v. Hawes*, 2 Bl. 554; *Garland v. Wynn*, 20 How. 6; *Silver v. Ladd*, 7 Wall. 228; *Start v. Starrs*, 6 id. 419; *Bludworth v. Lake*, 33 Cal. 262; *Sulmon v. Symmons*, 30 id. 306; *Moore v. Robbins*, 96 U. S. 535.)

When the respondent, in 1870, went upon the land and ousted the appellant, he was an intruder and wrong-doer, and under such circumstances he should not have been permitted to intervene between the appellant and the United States, and it is inequitable now that he should retain the title thus acquired. (*Atherton v. Fowler*, 96 U. S. 513; *Wilkinson v. Merrill*, 52 Cal. 424; *Toland v. Mandell*, 38 id. 43; *Hodapp v. Sharp*, 40 id. 69; *Fiscalina v. Doyle*, 47 id. 437; *Hosmer v. Wallace*, 97 U. S. 579.)

Michael Mullany, for Respondents.

Plaintiff states himself into open enmity with "equity and good conscience." Plaintiff states in his complaint that the eighty acres in controversy was held and claimed as part of a valid Mexican grant from "some time prior to the year 1860" (and necessarily from some time prior to the acquisition of California by the United States) until the sixth day of June, 1871. During this period of time the Mexican grantees were entitled to the exclusive possession of this tract, it being within the exterior boundaries of their grant. (*Ferris v. Coover*, 10 Cal. 621; *Mahoney v. Van Winkle*, 21 Id. 554, and many other subsequent cases.)

The complaint does not state facts sufficient to constitute a cause of action. The object of the action is to have defendant Sinclair declared to be trustee for plaintiff of the title to the land in controversy which was obtained from the United States by him as a pre-emption settler. If this case ever develops into such a trust, it was something never intended by either plaintiff or defendant.

It is directly averred that after full hearing of the claims of plaintiff's grantor and defendant Sinclair, before the officers of the United States Land Department, "and long after said tract of land in question had been forever excluded from any claim under said Mexican grant, and at a time when the same was subject to disposition by the Commissioner afore-said, as other public lands of the United States," the land in controversy was awarded to defendant as a pre-emption settler, and a patent was issued to him. This single averment, supported by the dates stated in other averments, con-

cludes plaintiff. (*Huff v. Doyle*, 93 U. S. R. 558; 14 U. S. Stats. at Large, 218, §§ 1, 2, and 8.)

The complaint does not state facts sufficient to constitute even the State of California, under which plaintiff claims, into a trustee of the legal title, assuming the land to have been listed to the State instead of being patented to defendant, Sinclair. (*Grogan v. Knight*, 27 Cal. 515.)

James C. Martin and *Curtis H. Lindley*, also for Respondents.

It appears from the complaint, that the land was never listed to the State, and the fee of the land resided in the General Government until the patents were issued to the respective respondents. The State has no title which it can convey, until the land has been listed to it by the General Government. (*Collins v. Bartlett*, 44 Cal. 371; *Chant v. Reynolds*, 49 id. 213; *Hodapp v. Sharp*, 40 id. 73; *Churchill v. Anderson*, 53 id. 212; *Buhne v. Chism*, 48 id. 467.)

Until the State obtains a title, plaintiff is not entitled to a patent. There can be no question but that Congress had the power to confer upon the Land Department the exclusive jurisdiction to finally determine the validity of these State selections. (*Miller v. Little*, 47 Cal. 350; *Wilkinson v. Merrill*, 52 id. 424; *Mace v. Merrill*, 56 id. 554.)

The decisions cited by appellant, to the effect that where the officers of the Land Department have, by mistake of law, given the title of land to one party which should of right have been given to another, a Court of Equity will give relief, such as prayed for in this case, have no application to the case attempted to be made by plaintiff. Those decisions arose in contests between parties claiming title and patents from the same source, and under the general pre-emption laws, and not as in these cases, in which the plaintiff claims as a purchaser from the State, and as being entitled to a State patent, against the defendants, who have acquired United States patents as pre-emptioners; nor were those decisions made under the Act of July 23, 1866, by which the decision of the Land Department was expressly made final and conclusive upon all parties before it, and upon all questions of both law and fact.

The case of *Poppe v. Athearn*, 42 Cal. 606, is conclusive against the plaintiff's right to recover in this action.

MCKEE, J.:

By the complaint in this case, the plaintiff seeks to charge the defendant as trustee of the legal title to a tract of land in Alameda County, known and described as the north half of the southeast quarter of section seven, township three south, range three west, Mount Diablo meridian. A demurrer to the complaint was sustained by the Court below, the plaintiff declined to amend, and, final judgment having been entered against him, he appeals.

Originally, as it appears from the complaint, the land formed a part of several leagues of land embraced within the exterior boundaries of a Mexican grant named Las Pocitas; and it stood in that position until June 6, 1871, when it was excluded from the grant by the confirmation of the final survey of the ranch.

On July 1, 1871, the Surveyor General of the United States for the State of California, having surveyed in the field the township within which the land was located, and sectionized and subdivided it, and constructed his survey into and upon a township plat, filed a duplicate of the township plat in the local land office in the district of San Francisco, within which the land was located; and the defendant, who was then and had been in possession of the land, residing upon and claiming it as a pre-emptioner, presented and filed in the local Land Office his declaratory statement of his intention to pre-empt the land under the pre-emption laws of the United States. Thereafter, and within three months after the township plat had been filed, the plaintiff, who also claimed the land as a purchaser from the State of California, presented and filed in the same office a claim to have the land certified over to the State for his benefit, pursuant to an Act of Congress entitled, "An Act to quiet land titles in California," approved July 23, 1866.

Upon these hostile and opposing claims a contest arose, before the officers of the Land Department of the United States, which was heard by the Commissioner of the General Land Office, and determined adversely to the plaintiff; and

the decision, on appeal, was affirmed by the Secretary of the Interior. By the decision the claim of the plaintiff was rejected; and, instead of certifying the land over to the State of California for his benefit, as, under the Act of July 23, 1866, the plaintiff claims the Commissioner and Secretary of the Interior were bound to do, they, in alleged violation of the provisions of that Act, awarded the land to the defendant under the pre-emption laws of the United States, and made an order permitting him to enter it under his pre-emption claim, and, upon his entry and payment of the purchase price of the land, caused to be issued and delivered to him a patent therefor on the fifteenth of August, 1876.

The plaintiff alleges that this decision was contrary to law, because he proved, in the investigation of the contest, to the satisfaction of the Commissioner of the General Land Office, and the Commissioner found, that, in the year 1863, the State of California, by its locating agent, selected and located the land in dispute in part satisfaction of the grant by the United States to said State of the sixteenth and thirty-sixth sections of land, in each township in said State, under an Act of Congress entitled "An Act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes," approved March 3, 1853; and also in lieu of, and as indemnity for, certain of said sixteenth and thirty-sixth sections of lands in the State, or portions thereof, which had become lost to the State, under the terms and conditions of the Act of Congress; that the State, after it had so selected and located the land, sold and disposed of the same to the grantors of the plaintiff on the seventeenth of February, 1864, to whom, on payment of the purchase price "pursuant to the law of the State," the Register of the State Land Office issued and delivered a certificate of purchase, under and by virtue of which the purchasers entered into possession of the land and continued in possession until September 24, 1870, when the defendant intruded upon their possession, and from that date has continued in the undisturbed possession of the same. But the plaintiff, and those under whom he claims, "some time in 1866," presented to the Register and officers of the local Land Office of the United States the State selection and lo-

cation and their claim of title thereunder; and the same was, by the Register, noted and entered in writing upon the tract-book of the local Land Office, and upon the tract-books of the general Land Office of the United States, at Washington, whereby the officers of the Land Department had notice of the equitable rights of the plaintiff.

Upon these proofs and findings, the plaintiff claims that the land should have been certified over to the State for his benefit; and that he is now entitled to the patent, which, upon the erroneous decision of the Commissioner and Secretary of the Interior, has come into the hands of the defendant.

There is no doubt that where the party has obtained from the United States a patent to a tract of public land, which, in equity and good conscience, and by the laws which Congress has passed on the subject, ought, upon a true construction of those laws, to go to another who establishes a prior right to it, that a Court of equity will control the patent in favor of the prior equity, and compel a conveyance of it to the owner of the equity. (*Johnson v. Towsley*, 13 Wall. 72; *Silver v. Ladd*, 7 id. 228; *Garland v. Wynn*, 20 How. 6; *Lindsey v. Hawes*, 2 Black. 554). But to entitle the claimant of a patent issued to another to equitable relief, he must show such a right to the premises described in the patent as, in equity and good conscience, and according to the laws of Congress upon which he relies, entitles him to the patent. Coming into a Court of equity, asking for the interference of equity, he must not only show an equitable right to relief, but he must offer to do equity. He must show a reason valid in conscience, as well as an equitable title enforceable in a Court of chancery.

Now it will be observed, that the basis of the claim asserted by the plaintiff rests upon the Act of Congress passed July 23, 1866. By that Act Congress undertook to confirm to the State all selections of any portion of the public domain, made by her in part satisfaction of any congressional grant, and which she had disposed of to purchasers in good faith under her laws. Certain lands were excepted from such confirmation, among which were lands covered by a Mexican or Span-

ish grant at the time of the selection. But if such lands were afterwards excluded from the grant, and became part of the public domain of the United States, they were made subject to the selection and to confirmation when the United States surveys were extended over them. (*Huff v. Doyle*, 93 U. S. 558.) To this last class of lands the land in dispute belonged. It was not surveyed by the United States until 1871, and the official plat of the survey was not filed in the proper Land Office until the twenty-eighth of June, 1871. On that day the land became and was part of the public domain of the United States, and, for the first time, it was open for settlement as other public lands of the United States, to the plaintiff, claiming as a purchaser under the State laws under the Act of Congress, or to the defendant, who was then in possession of it, claiming the right to pre-empt it under the pre-emption laws. (*Rich v. Maples*, 33 Cal. 109; *Mahoney v. Van Winkle*, id. 448; *Newhall v. Sanger*, 92 U. S. 762.) When it became public land, the claims to it of both the plaintiff and defendant depended upon the respective congressional enactments under which they were presented to the Land Office. Neither of the parties acquired any equitable right to the land by the mere assertion of his claim. It was necessary for each to establish his right by making the proof required by the law under which he asserted it; and by showing a compliance with its terms and conditions.

Originating, as did the right of the defendant, in the possession which he had of the land at the date of the filing of the official plat, his settlement gave him the status of pre-emptioner under the pre-emption laws. At the same time the Act of Congress of July 23, 1866, extended to a purchaser in good faith from the State, whose right originated in selection and location under the State laws, the same pre-emption rights. Both *bona fide* purchasers from the State and pre-emption claimants under the United States were placed by the Act on the same footing as to the acquisition of title. The object of the Act, as has been said by our predecessors in *Toland v. Mandell*, 38 Cal. 30, "was to legalize the possession of locators upon unsurveyed lands until they have opportunity to present their claims for determination by the officers of the United States, as provided by the Act,

and to enable them to maintain actions in the Courts in relation to it." (*Foscalina v. Doyle*, 47 Id. 437.) As residence and cultivation precede entry by a pre-emptioner, under the pre-emption laws, so selection and location upon public lands are necessary to the claim of a *bona fide* purchaser from the State under the Act; cultivable lands belonging to the State are grantable only to actual settler. (*Johnson v. Squires*, 55 Id. 103.) The plaintiff admits that the State's selection was void, and that by it alone he acquired no right. He has, therefore, no equitable right to the land, unless the alleged selection and location have been recognized and ratified by the provisions of the Act of 1866, and he has shown such a compliance with its terms and conditions as entitled him to the benefit of the Act.

That Act undertook to confirm selections made by the State upon two classes of land: 1. Lands which had been surveyed by the authority of the United States; and, 2. Lands which had not been so surveyed. Section 2 provides, as a condition precedent to confirmation of selections upon surveyed lands, for a notice of such selection to be given by the "proper State authorities" to the Register of the United States Land Office. The law made the selection when this notice was given; and upon being given, it became the duty of the Register to investigate and determine the claim, and if found to be for land to which the State would be entitled by the grant under which the claim of selection is made, the proper officer of the United States Land Office was authorized to certify it over to the State, if the State had not already received the quantity of land that she was entitled to, under her grant, as provided by Sections 1 and 2 of the Act.

But if selections had been made upon unsurveyed lands, such selections, when surveyed, and marked off and designated in the field, gave, according to the provisions of Section 3 of the Act, to a purchaser in good faith under the laws of the State, the pre-emption rights of a settler on the unsurveyed lands; and upon the filing of the township plat in the proper local Land Office, the State claimant was allowed the same time as a pre-emptor to present and prove up his purchase and claim under the Act.

Now, the alleged selection must have been made on sur-

veyed or unsurveyed land. If made on unsurveyed land, the complaint of the plaintiff fails to show that the "proper authorities of the State" had notified the Register of the proper Land Office of the selection; and neither that officer nor any other officer of the Land Office, was bound by the Act to certify the land over to the State. The complaint is also uncertain as to whether the claim of the plaintiff is asserted upon a selection made on surveyed or unsurveyed land; for while the complaint contains averments which show that, at the date of the selection, the land had been surveyed in the field by the proper officer, and that a record of the survey and plat thereof was made and filed, but was afterwards withdrawn, it also shows that the land did not become part of the public domain until it was excluded from the Mexican grant, within the exterior limits of which it was at the time of the alleged survey, and it was not subject to selection under the Act of Congress until the filing of the official plat.

Besides, whether the land was surveyed or unsurveyed, it was necessary for the complaint to show by proper averments that the plaintiff, in the assertion of his claim to the land proved that he had purchased it in good faith from the State; that it had been selected and located under the laws of the State as part of the surveyed or unsurveyed lands of the United States, which were subject to be so selected; and that he had complied with the terms and conditions of the Act of Congress which ratified the selection. (*The Secretary v. McGarrahan*, 9 Wall. 298.) These constituted the elements of his asserted equitable right. But upon all of them the complaint is uncertain and insufficient. It is not alleged, nor does the plaintiff claim, that he purchased the land directly from the State, or that he ever located on it, or occupied or improved it, or paid or contracted to pay the State for it. On the contrary, it is alleged that the land was purchased from the State by his grantor or grantors, to whom, after making a payment, pursuant to the laws of the State, which required a payment of twenty per cent of the purchase, a certificate of purchase was issued, under which they occupied the land until 1870, when they were dispossessed by the defendant, who has ever since continued in the unques-

tioned and undisturbed possession of the land. And, except so far as it may appear from the averments of the legal conclusions that they were *bona fide* purchasers under the law of the State, and that a certificate of purchase was issued to him, it does not appear, from any allegations in the complaint, that they had complied with the laws of the State so as to constitute them *bona fide* purchasers from the State. It might be that the authorities of the State had refused to notify the Register of the Land Office of the selection of the land, as they were bound to do by the second section of the Act of Congress, just because the alleged purchasers had not complied with the State laws; and *non constat* that the State would have conveyed to them the land if it had been selected. Averments of legal conclusions in a pleading do not obviate the necessity for a statement of the facts which are essential to constitute a right claimed under a statute. It is true, that under the laws of the State the certificate of purchase was made evidence of the legal title; but having been issued for land which was not public land, and had not been surveyed by the United States, the certificate was void. (*Young v. Shinn*, 48 Cal. 26.) Being void, it was not in itself evidence of that location on the land, and that purchase of it from the State and payment for it which would constitute them *bona fide* purchasers.

To constitute them such, as against the patentee of the United States, to whose title they assert a better right, it would be necessary for them to allege in their pleading that in the contest for the land before the Land Department they not only produced their certificate of purchase, but they also proved, and there was "found" the performance of the series of acts required by law to entitle them to the certificate and the steps which had been taken to complete the purchase from the State, so as to entitle them to a patent from the State. (*Laughlin v. McGarvey*, 50 Cal. 169; *Cadierque v. Duran*, 49 Id. 356; *The Secretary v. McGarrahan*, *supra*.) Unless these things were proved and "found" they would fail to show in themselves that better right in favor of which a Court of equity would interpose to control the right of the patentee; and one who claims simply, and by no other right

than as assignee of their void certificate of purchase, is in no better position.

Moreover, it does not appear by any allegation in the complaint *when* the assignment of the certificate of purchase was made—whether before or after the contest before the Land Department—nor is it alleged that it was proved or found that the plaintiff was the owner and holder of the certificate, or a *bona fide* purchaser of the land in good faith and for a valuable consideration from the State.

He filed the complaint in this case in April, 1878, and all that he alleges on that subject is “that he is *now* the owner and holder of the certificate of purchase.” Inferentially, therefore, he did not become the owner and holder of it until after the decision of the Land Department. If he purchased after that, he bought with notice of the possession of the defendant, of the judgment in his favor, and of the issuance of the patent; and as a purchaser of the certificate from the alleged original purchasers from the State, with notice of those things, he is not a *bona fide* purchaser from the State, within the meaning of the Act of Congress.

But whether the purchase of the void certificate was made before or after the contest before the officers of the United States Land Department, as the plaintiff had never located on the land, never occupied or improved it, never paid or contracted to pay for it, to the United States or the State of California, it would be neither according to equity nor good conscience to compel the defendant to convey to him the legal title.

Furthermore, there is no allegation in the complaint that the land for which it is alleged that the land in dispute was selected, has been lost to the State. Presumably, therefore, those lands were in place, and the land in dispute was not subject to selection, or if subject to selection, the right of selection had not accrued, because land within the exterior limits of a Mexican grant did not, under the Act of July 23, 1866, become subject to selection until it had been excluded from the grant, and the lines of the survey by the United States had been extended over it, and the Surveyor-General of the United States for the State had furnished the State

with an official list of the sections of land which were within a reservation, or private grant, or settled upon, and, in consequence thereof, were lost to the State. (§ 6, Act July 23, 1866.) Such an official list was made necessary as the basis of selection of land in lieu of those lost sections, and until it was furnished, the right to select had not accrued, and the land in dispute was not subject to selection. (*Sherman v. Bruick*, 93 U. S. 209.)

It follows that the plaintiff has not, by his complaint, brought himself into such relations with the land in controversy as entitles him to call in question the decision of the United States Land Department awarding the land to the defendant, or to control the patent which was issued to him.

Judgment affirmed.

MYRICK, SHARPSTEIN, MCKINSTRY, JJ., and MORRISON, C. J., concurred.

In *Jose Aurrecochea v. Joseph L. Bangs et al.*, No. 7,447; *Jose Aurrecochea v. George Gerke et al.*, No. 7,448; *Jose Aurrecochea v. Amos L. Bangs et al.*, No. 7,449; *Jose Aurrecochea v. Earl B. French et al.*, No. 7,470; and *Jose Aurrecochea v. John W. Clark et al.*, No. 7,483, the judgments were upon demurrer to complaints similar to that in *Aurrecochea v. Bangs*, No. 7,251, reported *supra*; and were affirmed upon the authority of that case.

No. 6,998.—Department Two.]

May 30, 1882.

J. S. DYER v. AMMERILLA PARROTT ET AL.

STREET ASSESSMENT—DIAGRAM—STREET CROSSING—APPEAL TO BOARD OF SUPERVISORS.—In an action to foreclose a lien for a street assessment, it appeared that the only objection to the assessment was purely technical, and that it did not and could not affect any substantial right or interest of the defendant.

Held: By neglecting to appeal to the Board of Supervisors, the defendant waived the objection.

APPEAL from a judgment for the defendant, and from an order denying a new trial, in the Twenty-third District Court of the City and County of San Francisco. THORNTON, J.

The defendant's lot is numbered 11 on the diagram attached

The Court found with reference to the assessment and diagram as follows :

On the fourth day of December, 1875, was made a pretended assessment of the total amount of expense of said work necessary to be assessed to cover the sum due for said work and the incidental expenses thereof, upon the lots and lands fronting on said portion of Greenwich street whereon said work was done, but did pretend to assess the expense of so much of said work as was done on the said main street-crossings upon the lots and lands included within the four quarter blocks adjoining and cornering on said crossing respectively, except as to the middle fifty-vara lots in the blocks between Laguna and Fillmore streets, and each lot, and each part of lot, excepting said middle lots, was thereby separately assessed in proportion to its frontage on said streets, at rates per front foot, which rates were sufficient to cover the total expense of such work; and said assessment was signed by said Superintendent, and had attached thereto a diagram exhibiting each street and street-crossing, lane, alley, place, or court on which said work was done, and showing the relative location of each distinct lot, and portion of a lot, to the work done, and numbered to correspond with the numbers in said assessment, and also showing the number of feet fronting on said streets, and assessed for said work contracted for and performed, and to which assessment was attached the warrant issued in said case, and hereinafter described, which assessment, diagram, and warrant are hereto annexed and made a part hereof, and marked "Exhibit A;" that there was no diagram attached to said assessment, showing the lots included within the four quarter blocks adjoining and cornering on several crossings, and so pretended to be assessed, on which said lots the expense of work should have been assessed.

The following is a copy of the diagram referred to:

MOULTON

STREET.

137.6	
24	68.9
25	137.6
137.6	

STREET.

120	
1	137.6
2	137.6
3	137.6
120	

STREET.

120	
4	137.6
5	137.6
6	137.6
120	

STREET.

137.6	
7	137.6
8	137.6
9	137.6
137.6	

STREET.

137.6	
26	137.6
27	68.9
137.6	

GREENWICH

STREET.

120	34.4 1/2
23	34.4 1/2
22	
21	137.6
120	

FILLMORE

137.6	
20	137.6
19	27.6
18	111
17	137.6
137.6	

WEBSTER

120	
16	137.6
15	137.6
14	137.6
120	

BUCHANAN

137.6	
13	137.6
12	137.6
11	50
30	57.6
77.6	10
	60

LAGUNA

137.6	
29	137.6
28	68.9

PIXLEY.

PIXLEY STREET.

J. M. Wood, for Appellant.

The Court found a judgment for the defendants, because of an alleged defect in the diagram, which we claim that such error or omission did not prejudice the defendants, whose lot was properly assessed, and which was entirely included in one quarter block. That the amount of the assessment was neither increased nor lessened, nor anywise altered, by reason of the alleged defect in the diagram. We claim also that their only remedy was by appeal to the Board of Supervisors, had defendants needed any remedy. (*Dorland v. McGlynn*, 47 Cal. 50.)

Not having appealed to the Board of Supervisors, the defendants must be held to have waived any objection to the diagram which they might have had. (*Chambers v. Satterlee*, 40 Cal. 519; *Creighton v. Pragg*, 21 id. 120; *Conlin v. Seaman*, 22 id. 548; *Emery v. Bradford*, 29 id. 85-87; *Taylor v. Palmer*, 31 id. 256; *Beaudry v. Valdez*, 32 id. 278; *Nolan v. Reese*, id. 487; *Shepard v. McNeil*, 38 id. 74; *Barber v. San Francisco*, 42 id. 633; *Himmelmunn v. Hoadley*, 44 id. 279; *Oakland Pav. Co. v. Rier*, 52 id. 276, 277.)

Sawyer & Ball and *E. F. Preston*, for Respondent.

The law requires the expenses of work done on main street crossings to be assessed upon the four quarter blocks adjoining and cornering on the crossings. (Stat. 1871-72, p. 810, Subd. 3.) Also that an assessment shall be made by the Superintendent of Public Streets, Highways and Squares to cover the sum due for the work performed, including incidental expenses, and that he shall attach thereto a diagram exhibiting each street, or street-crossing, lane, alley, place, or court, on which any work has been done, and showing the relative location of each distinct lot, or portion of lot, to the work done, numbered to correspond with the numbers in the assessment, and showing the number of feet frontage assessed for said work. (Stat. 1871-72, p. 813.) There is no diagram attached to the assessment, showing the lots included within the four quarter blocks adjoining and cornering on said several crossings on which said lots the expense of work should have been assessed. This rendered the entire assessment null and void.

The remedy is not by appeal, because when the assessment is void on its face the property owner is not called upon to appeal. (*Himmelmänn v. Bateman*, 50 Cal. 11; *People v. Quackenbush*, 53 id. 52; *Himmelmänn v. Cahn*, 49 id. 285; *Gately v. Bateman*, 7 Pac. C. L. J. 364.) The appellant says that respondent cannot complain, because the assessment against lot No. 11 has not been effected. But the assessment cannot be partly void and partly valid—it is either void or valid, as a whole. (*People v. Holladay*, 25 Cal. 300; *People v. Lynch*, 51 id. 19; *Whiting v. Quackenbush*, 54 id. 306; *Schumacker v. Toberman*, 56 id. 508.)

The Court:

The objection to the assessment in this case is purely technical. It is not claimed that the omission complained of affected, or could affect, any substantial right or interest of the defendant. The error is one which might have been easily remedied by an appeal to the Board of Supervisors. But no appeal was taken to that Board. If an appeal had been taken and determined, the determination would be final and conclusive upon all parties entitled to appeal. (Stat. 1871-72, p. 815, § 12.)

We think that by neglecting to appeal the defendant waived the objection which he now raises to the assessment, and that the judgment and order of the Court below should be reversed.

Judgment and order denying a new trial reversed.

[No. 7,240.—In Bank.]

May 30, 1882.

WILLIAM M. NEILSON v. JAMES R. LEE.

REAL ESTATE BROKER—AGENT—SALE—COMMISSIONS—CONSTRUCTION OF CONTRACT.—By an agreement in writing, the plaintiff was authorized by the defendant, at any time within sixty days, to sell his mine for a sum not less than sixty-five thousand dollars; and within the time specified, made a written agreement with H., a responsible purchaser, in the name of his principal, for the sum of seventy-five thousand dollars—H. to have twenty days to examine the title, and if the same was not good

and to the satisfaction of H., the agreement to be void. At the same time the plaintiff made a separate written agreement with H. that if the defendant did not sign the agreement on or before twelve o'clock M., August 26, 1878, H. should be released from the contract. The defendant refused to sign the agreement within the time specified, and H., on that ground, notified the plaintiff that he withdrew from the contract. The Court found that the plaintiff did not procure a purchaser.

Held: By refusing to ratify the agreement the defendant refused to sell the property to H. at the price, and on the terms which he had agreed with the plaintiff to sell it; and this being so, the finding that the plaintiff did not procure a purchaser able and willing to purchase the property is against the evidence.

APPEAL from a judgment for the defendant and an order denying a new trial in the Third District Court of the County of Alameda. MCKEE, J.

The complaint alleges:

That on the thirtieth day of June, A. D. 1878, at the City and County of San Francisco, said plaintiff and defendant executed and entered into a written agreement, of which the following is a copy:

"Whereas, James R. Lee, of the City and County of San Francisco, is seised at law and in equity of certain mining claim on the Comstock lode, being part of the ground now occupied by the Mexican Gold and Silver Mining Company, and some time since standing in the official records in the name of V. A. Houseworth, and being in length along the side lode eighty-three feet and three inches, be the same more or less. It is agreed between the said James R. Lee and William M. Neilson, that for and in consideration of the sum of five (5) dollars in United States gold coin, to him duly paid, the receipt of which is hereby acknowledged, the said Lee agrees to appoint the said Neilson to act as his sole agent in the sale of said mining claim, upon the terms following:

"First—That out of the proceeds of any sale effected of said claim, the said Lee is first to receive fifty thousand (\$50,000) dollars in gold coin, and any balance obtained over that amount, to be equally divided between the said Lee and Neilson, but no sale to be effected that does not yield to the said Lee a total of fifty thousand (\$50,000) dollars gold coin, as his share. But, notwithstanding, if the proceeds of such

sale amount to no more than fifty thousand (50,000) dollars, the said Lee will pay to the said Neilson five per cent. of that sum, or twenty-five hundred (\$2500) dollars.

"Second—That no expenses are to attach to the said Lee, unless a sale is effected; and not then, unless his share of the proceeds exceed fifty thousand (\$50,000) dollars.

"Third—That this agreement is to remain in force for sixty days from the first day of July, 1878, with the right retained by said Neilson to renew it for thirty days thereafter.

"(Signed)

JAMES R. LEE,

"WILLIAM M. NEILSON."

That afterwards, to wit, on the twenty-first day of August, A. D. 1878, at the said City and County of San Francisco, the said plaintiff and defendant executed and entered into another written agreement, of which the following is a copy:

"SAN FRANCISCO, June 30th, 1878.

"Whereas, James R. Lee, of the City and County of San Francisco, is seised at law and in equity of a certain mining claim on the Comstock lode, being the following described property, situated in the County of Storey, State of Nevada, to wit: A certain mining claim on the Comstock lode, being the undivided one sixth interest in the five hundred feet of ground on said Comstock lode, formerly owned by Valentine A. Houseworth, and being the property now owned by the said James R. Lee: It is agreed between the said James R. Lee and William M. Neilson, that for and in consideration of the sum of five dollars (\$5) in United States gold coin, to him duly paid, the receipt of which is hereby acknowledged, the said Lee does appoint the said Neilson to act as his sole agent in the sale of said mining claim, upon terms following:

First—That out of the proceeds of any sale effected of said claim, the said Lee is first to receive sixty-five thousand dollars (\$65,000) in gold coin, and any balance obtained over that amount, to be equally divided between the said Lee and Neilson.

Second—That no expenses are to attach to the said Lee, unless a sale is effected, and not then, unless his share of the proceeds exceed sixty-five thousand dollars (\$65,000).

Third—That this agreement is to remain in force for sixty

days from the first of July, 1878, with the right retained by the said Neilson to renew it for thirty days thereafter.

"Signed)

"JAMES R. LEE,

"WM. M. NEILSON."

But this last-named agreement was not to be effectual to change the former agreement as to the amount the said plaintiff was to receive for his services in selling said property, and, as evidence of this, this said plaintiff and defendant entered into another written agreement, signed by defendant, of which the following is a copy:

"SAN FRANCISCO, August 21st, 1878.

"WM. M. NEILSON, Esq.—*Dear Sir*: It is of course understood and agreed between us, that the settlement for your services in the sale of my property on the Comstock lode is to be on the basis of the first agreement, which allows you one half of all that may be realized from any sale over fifty thousand dollars (\$50,000).

"(Signed)

JAMES R. LEE."

Plaintiff further alleges that on the twenty-third day of August, 1878, and while plaintiff was the authorized agent of the defendant to negotiate the sale of the property herein described, and authorized to execute an agreement for the defendant with person or persons for that purpose, defendant, by his said agent, negotiated a *bona fide* sale of said property, and executed a written agreement with the purchaser, H. A. Hedger, of which the following is a copy:

"This agreement made this twenty-first day of August, 1878, between James R. Lee, of Oakland, Alameda County, State of California, by his sole agent (and attorney-in-fact) William M. Neilson, of the City and County of San Francisco, and H. A. Hedger, of the said City and County of San Francisco, witnesseth: That the said James R. Lee agrees to sell and convey to the said H. A. Hedger, at such time as the said Hedger may desire, within twenty days from August 21, 1878, the one sixth undivided interest in that mining ground and claim, situate in the Virginia Mining District, in the County of Storey, and State of Nevada, adjoining the claim of the Ophir Silver Mining Company on the north, and containing five hundred (500) feet, and known as the ground and claim

of the Atchison Gold and Silver Mining Company, and being the premises conveyed to the said James R. Lee by deed from V. A. Houseworth, dated the twenty-ninth (29) day of September, A. D. 1874, and acknowledged the twenty-first (21) day of December, A. D. 1874, by his attorney-in-fact, before Edward Chattin, Commissioner for the State of Nevada, and residing in San Francisco, California, and recorded December 24th, A. D. 1874, in Liber 34 of Deeds, in the said County of Storey, State of Nevada, and to make and execute unto the said H. A. Hedger, a good and sufficient deed and transfer, conveying the absolute title of said property to him. In consideration whereof, the said H. A. Hedger agrees to pay to the said James R. Lee, or his said agent and attorney, on receiving said deed duly executed, conveying the title aforesaid, the sum of seventy-five thousand (75,000) dollars in United States gold coin. It is further agreed by and between the parties hereto, that the said H. A. Hedger may have twenty days from said twenty-first day of August, 1878, in which to examine and pass upon the title to said premises, and if the said title is not good and sufficient, either in whole or in part, and to the satisfaction of the said H. A. Hedger, then this agreement becomes void and of no force or effect whatever.

"In witness whereof, the parties to these presents have hereunto set their hands and seals the day and year first above written.

"(Signed)

"H. A. HEDGER,

"JAS. R. LEE,

"By his sole agent and attorney in fact,

WM. M. NEILSON."

Plaintiff further alleges that defendant agreed, at the time of executing the agreement last recited, in writing, through his said agent the plaintiff, with the said H. A. Hedger, of which agreement the following is a copy:

"I, Wm. M. Neilson, the undersigned, do hereby agree with H. A. Hedger, that if James R. Lee my principal, does not sign, ratify and approve the agreement made this day by the said Neilson, as his agent and attorney, with said H. A. Hedger, on or before 12 o'clock noon, August 26, 1878, then that

the said H. A. Hedger be released from all obligations therein, and from all covenants and obligations contained in said contract.

"August 23, 1878.

"WM. M. NEILSON."

That notice of this agreement was given in writing by plaintiff to defendant August 23, 1878, in the city and county of San Francisco, of which the following is a copy :

"MR. JAMES R. LEE : You will take notice that the parties purchasing your claim in the Comstock lode, in the State of Nevada, from me, under my contract with you, empowering me to make the sale of your claim, have reserved the right to avoid the purchase from me, unless the instrument of sale from me to them is confirmed and executed by you by 12 o'clock (noon), August 26, 1878. The said instrument is now at the office of your attorney, Mr. Byrne, awaiting your signature.

"Friday, August 23, 1878.

"Respectfully,

"WM. M. NEILSON."

Plaintiff further alleges that on the twentieth day of August, 1878, he served on the defendant a draft copy of the first recited agreement made with the said Hedger, and at the same time delivered to said defendant a written notice, of which the following is a copy :

"SAN FRANCISCO, August 20, 1878.

"JAMES R. LEE, ESQ.—My Dear Sir: It affords me satisfaction to inform you that I have made sale of your claim on the Comstock Lode for the sum of \$75,000 U. S. gold coin. In order that you may understand the whole transaction I inclose you a copy of the agreement, which I have, under my powers, agreed to sign on your behalf. There are some expenses to be paid, the paying of which will be greatly to your advantage, which can be arranged amicably between us. Though your assent to the agreement is not necessary, yet I am desirous of having it; but failing in that, I shall proceed to sign the contract without delay.

"Sincerely yours,

"WM. M. NEILSON."

A. C. Searle and E. C. Marshall, for Appellant.

That the interpretation placed by the Court below upon the words used in the contract between plaintiff and defendant, that the plaintiff should "effect a sale" before being entitled to payment for his services, is forced, strained, altogether inadmissible, and not warranted by law. The plaintiff did "effect a sale," as far as it was physically possible for an agent to effect one, who had not his principal's power of attorney to execute a deed. (*Phelan v. Gardner*, 43 Cal. 310; *Middleton v. Findla*, 25 id. 82; *Blood v. Shannon*, 29 id. 395; *Gonzales v. Broad*, *Pacific Coast Law Journal*, vol. 7, p. 288; *Barnard v. Mannot*, 3 Keyes' N. Y. 204; *Kock v. Emmerling*, 22 How. U. S. 69.)

An agent may be entitled to his compensation though he has not accomplished the thing he was employed to do, if he was prevented from doing it by the act, or failure to act, of his principal. (See Story on Agency, 392, and notes; Parsons on Contracts, 89, 90.) An agent has the undoubted right to require his principal to perform any reasonable act within his power necessary to or in furtherance of a consummation of the sale.

Baggett & Platt, also for the Appellant.

A sale was effected. A broker need be only a procuring cause; he can not conclude a sale; his power is limited to the bringing of seller and purchaser together. When he has done this he has effected a sale, within the meaning and intent of his contract. (*McCreery v. Green*, 38 Mich. 184; *Phelan v. Gardner*, 43 Cal. 310; *Glentworth v. Luther*, 21 Barb. 145; 4 Daly, 143; *Barnard v. Monnot*, 3 Keyes, 204; *Rice v. Mayo*, 107 Mass. 552; *Love v. Miller*, 53 Ind. 300.)

If Neilson had authority to execute the Hedger-Neilson agreement (and he had such authority, *Rutenberg v. Main*, 47 Cal. 214), his acts were the acts of Lee, and no new condition was imposed by Hedger in requiring Lee's ratification of these acts. Lee was not asked to do a single thing not already done by him through Neilson. That said sale failed to be completed through the fault of Lee.

"It is a well-settled and sound principle of law, that he

who prevents a thing being done shall not avail himself, to his own benefit, of the non-performance which he has occasioned." (*Cook v. Fiske*, 12 Gray, 491; *Rice v. Mayo*, 107 Mass. 550; *Delaplaine v. Turnley*, 44 Wis. 31; *Coleman's Ex'rs v. Meade*, 13 Bush, [Ky.], 363; *Mooney v. Elder*, 56 N. Y. 238; *Bailey v. Chapman*, 41 Mo. 536; *Budd v. Zoller*, 52 id. 238; *Keys v. Johnson*, 68 Pa. St. 42; *Reed v. Reed*, 82 id. 420; *Green v. Lucas*, 31 L. T. Rep. [N. S.] 731; affirmed 33 id. 584; *Phelan v. Gardner*, 43 Cal. 310; *Middleton v. Findla* 25 id. 76; *Blood v. Shannon*, 29 id. 393.)

A principal can not relieve himself from his liability for commissions by a capricious refusal to consummate the sale. (*Delaplaine v. Turnley*, 44 Wis. 31; *Kock v. Emmerling*, 22 How. [U. S.] 69; *Moses v. Bierling*, 31 N. Y. 463.)

Lee cannot plead his want of absolute title as an excuse for not paying Neilson's commission. By his written contract with Neilson he had given notice to Neilson and all the world that he was "seised at law and in equity." (*Budd v. Zoller*, 52 Mo. 242, 246.)

Robinson, Olney & Byrne, for Respondent.

The third point made by the appellant is that an agent may be entitled to his compensation, although he has not accomplished the thing he was employed to do, if he was prevented from doing it by the act or failure to act, of his principal. The facts in this case do not show that the plaintiff was prevented by his principal from accomplishing the proposed sale. The finding of the Court below upon this point that "the plaintiff did not effect any sale of said property, nor did he procure a purchaser able and willing to purchase the same, is fully sustained by the evidence." (*Phelan v. Gardner*, 43 Cal. 310.)

Under the contract between the plaintiff and the defendant, the plaintiff had no authority to enter into the contract made by him with Hedger. The contract should have expressly provided that time was of the essence of the contract; that Hedger should purchase if the title was a good possessory title, and should have contained other provisions necessary for defendant's protection. Time is not of the essence of a contract to convey real property unless expressly so stated in

the written agreement. (*Brown v. Covilland*, 6 Cal. 566; *Steele v. Branch*, 40 id. 3-11-13; *Vassault v. Edwards*, 43 id. 458; *Dillon v. Masterton*, 39 N. Y. Sup. Ct. 133.)

The Hedger-Neilson contract substantially provides :

1. That Lee, without any consideration whatever, should bind himself to sell and convey the property at a future time.

2. That he should bind himself to give "a good and sufficient deed and transfer conveying the absolute title" of the property.

3. That Lee should bind himself positively to sell, while Hedger was under no obligation whatever (as we, with due respect, contend,) to purchase.

4. That Lee should sign and ratify a contract prepared by Hedger's attorneys, and so framed as to omit provisions materially necessary for the protection of his interests, and which imposed no responsibility upon Hedger. Neilson clearly had no authority under Lee's contract with him to impose such a burden upon Lee's property.

The testimony shows that the defendant was ready and willing, at all times, to sign or to ratify an agreement of sale by which his rights would be properly protected. No such agreement was ever offered to him by plaintiff for signature or ratification. But no such ratification was necessary, nor was it contemplated by the parties, or demanded by the terms of the contract. "In an action on a contract involving a condition precedent, the proofs must show performance of the condition, or else a waiver thereof." (*Livesey v. Omaha Hotel Co.*, 5 Neb. 50; *Story on Agency*, § 329; *Hill v. Grigsby*, 35 Cal. 656; *Englander v. Rogers*, 41 id. 420; *Bohall v. Diller*, id. 532; *Kelly v. Mack*, 45 id. 303; C. C. P., § 457.)

SHARPSTEIN, J.:

This is an appeal by the plaintiff from a judgment entered in favor of the defendant upon the following findings of fact:

- "1. On or about the thirtieth day of June, 1878, the plaintiff and the defendant entered into a contract in writing, by which the defendant appointed the plaintiff his agent in the sale of a certain mining claim in the State of Nevada, which contract was to remain in force sixty days from the first

day of July, 1878, with the privilege to the plaintiff to renew it for thirty days thereafter.

"2. By the terms of said contract, if plaintiff effected a sale of said mining claim within the time specified, for more than \$50,000, he was to receive as compensation for his services as agent in effecting said sale one half of the amount realized thereby, over and above said sum of \$50,000.

"3. Plaintiff was not to receive any compensation for his services, nor were any expenses incurred in the transaction to be chargeable against defendant, unless a sale was effected by plaintiff under said written contract.

"4. About the twentieth of August, 1878, plaintiff entered into negotiations with one H. A. Hedger for the sale to him of said property for the sum of \$75,000 in United States gold coin.

"5. These negotiations were carried on between the said parties until about the twenty-seventh day of August, 1878, when they were terminated by a notification to plaintiff from Hedger, that he declined to purchase the property.

"6. The plaintiff did not effect any sale of said property, nor did he procure a purchaser able and willing to purchase the same."

It is claimed by the appellant that the last finding and the last clause of the finding next preceding the last are contrary to the evidence. There is positive evidence of the pecuniary ability of Hedger to purchase the property, which is not contradicted, so that there is no conflict of evidence upon that question.

His willingness to purchase the property is evidenced by an instrument in writing between him and the plaintiff, in which he agrees to purchase it at the price and on the terms upon which the plaintiff was authorized by the defendant to sell it. In that agreement there is a stipulation that Hedger might have twenty days from its date in which to examine and pass upon the title to the property.

The agreement between the plaintiff and defendant was, by its terms, to remain in force for a period of sixty days from its date, and had, at the date of the agreement between the plaintiff and Hedger, more than twenty days to run.

Now it appears further by the evidence that Hedger insisted

upon a ratification of the agreement between him and the plaintiff by the defendant within a specified period, and that the defendant refused to ratify it within that period, and that Hedger at the expiration thereof notified the plaintiff that he, Hedger, considered himself released from any further obligation to purchase the property. By refusing to ratify said agreement the defendant, we think, refused to sell the property to Hedger, at the price and on the terms which the defendant had agreed with the plaintiff to sell it. And if that be so, the finding that the plaintiff did not procure a purchaser able and willing to purchase said property, is against the evidence. The evidence shows that the sale was defeated by the refusal of the defendant to ratify the agreement made by his agent, the plaintiff, with Hedger, and we are unable to find anything in the evidence which tends to show that Hedger was not both able and willing to purchase at the price and upon the terms fixed by the defendant in his agreement with the plaintiff.

Judgment and order denying a new trial reversed.

MORRISON, C. J., MCKINSTRY, ROSS, THORNTON, JJ.. concurred.

MYRICK, J. dissented.

McKEE, J., dissenting:

It is familiar law that a real estate broker is not entitled to commissions for making a sale of real estate for his principal, unless he strictly performs the services required of him according to the authority conferred upon him.

In the case in hand, the defendant, claiming to have been "seised at law and in equity" of a mining claim in the State of Nevada, authorized the plaintiff by an instrument in writing, to sell the claim at any time within sixty days from the first day of July, 1878, for such a sum of money as would net him sixty-five thousand dollars; and any surplus which might be realized from the sale, he agreed to divide equally between the plaintiff and himself, and to pay out of his share of the surplus whatever expenses might be incurred in making the sale.

No other terms were prescribed. Under this authority the plaintiff, as agent and attorney in fact of the defendant, on August 21, 1878, entered into an agreement in writing with one Hedger to sell and convey to him "the absolute title to the property," within twenty days from the date of the agreement, for the sum of seventy-five thousand dollars, payable on condition that Hedger would be satisfied with the title and that the defendant would sign, ratify and approve the agreement.

Hedger was able to pay. Negatively it appears that there was no fault in the title to the property; that Hedger took no steps to satisfy himself about it, and that he never demanded of the defendant to consummate the alleged purchase by a conveyance of the title. It also appears, affirmatively, that the defendant refused to sign the agreement in writing between Hedger and the plaintiff, and that the former, on August 27, 1878, notified the latter, that he considered himself released from all obligation to purchase.

There was, therefore, no actual sale of the property. Hedger was not a purchaser ready and willing to buy, nor did the defendant refuse to consummate a purchase by the conveyance of his title; he did refuse to sign the agreement in writing between Hedger and the plaintiff: but he was not bound by his contract with the plaintiff to sign any agreement in writing which the latter might make with a person to whom he offered the property for sale; and in refusing to do what he was not bound by his contract to do, the defendant was not at fault.

As an agent, the plaintiff could only bind his principal within the scope of his authority. It was not within the scope of his authority to make a conditional or contingent sale. Such a purchase, the defendant was not bound to accept. He had the right to determine for himself whether the offer to purchase upon such a contingency, as was agreed to by his agent, was made in good faith, and to refuse or accept the offer. And Hedger was not bound to purchase if the contingency which he presented, did not happen.

As, therefore, the plaintiff's claim to compensation was, by his own unauthorized act, made dependent upon an act which his principal was not bound to perform, no recovery can be

had upon it. A real estate broker is not entitled to recover commissions for a conditional sale of real estate which fails of actual consummation by no fault or fraud of the owner of the property. (*Hinds v. Henry*, 36 N. J. L. 333; *Walker v. Tirrell*, 101 Mass. 257.) Therefore I think the judgment and order of the Court below was correct, and should be affirmed.

[No. 6,200.—In Bank.]

May 30, 1882.

SAMUEL SOULE ET AL. v. ANDREW J. POPE ET AL.

HARBOR COMMISSIONERS—DOCKAGE—WHARFAGE—TOLLS—STREETS—DEFINITION.—Affirmed upon authority of *The People v. The San Francisco Gas Co.*, 60 Cal. 349.

APPEAL from a judgment for the defendants, and an order denying a new trial, in the Nineteenth District Court, of the City and County of San Francisco. WHEELER, J.

J. B. Lamar, for Appellants.

The wharf in question is on the inside, seventy-five feet of Berry street, between Second and Third streets, and opposite Block number 10; and Berry street is one of the streets of the City and County of San Francisco, and lying along the water-front. (Act of 1863-4, § 10, p. 143.)

The power of the Legislature to confer upon the Board of State Harbor Commissioners jurisdiction over the harbor of San Francisco, and particularly over the wharf on Berry street, is clear. The defendants have wharfed out, below high-water mark, into the navigable waters of the bay, into a street or highway, and the structure is a purpresture; and the Legislature, in placing this navigable arm of the bay, this highway, under the jurisdiction and control of the Board of State Harbor Commissioners, with power to collect dockage, wharfage, and tolls, exercised a sovereign right. Where the soil is the King, the buildings below the high-water mark is a purpresture—an encroachment and intrusion upon the King's soil, which he may either demolish, or seize, or arrent, at his pleasure. (Angell on Tide Waters, 199, 897.) "By the

American Revolution, the people of each State in their sovereign capacity, acquired the absolute right to all their navigable waters and the soil under them. That right was not granted by the Constitution of the United States, but was reserved to the States respectively; and new States have the same right of sovereignty and jurisdiction over the navigable waters within their limits as the original ones." (*Barney v. Keokuk*, 94 U. S. 324; *Goodtitle v. Kibbe*, 9 How. 471; *Withers v. Buckley*, 20 id. 84; *The Attorney General v. The City of Eau Claire et al.*, 37 Wis. 447.)

McAllister & Bergin, for Respondents.

The Harbor Commissioners had no right to collect wharfage or dockage from a bulkhead projected by defendants from their water-lot property, which bulkhead was situate on the inner half of Berry street, previous to the time that the locality called Berry street had been converted by some structure, or some filling, into a street or thoroughfare.

The tenth section of the statute of March 5, 1864 (Statutes of California, 1863-64, page 143), cited in appellants' brief, has no application to this case, as that statute was repealed by the Political Code on the first of January, 1873, and the transactions in question occurred in December, 1874, and January and February, 1875. (Pol. C., § 18.) The power of the Harbor Commissioners, during December, 1874, and January and February, 1875, was derived from Sections 2,521 to 2,554 of the Political Code.

Upon the proper construction to be placed upon Section 2,535 this case depends. Undoubtedly, the latter part of this section gave the power to collect dockage, wharfage, and tolls upon the inner half of the streets lying along the water front; but, we say, not before such localities had become streets, not before they afforded means of passage for vehicles or foot passengers; not before they had practically become thoroughfares.

Section 2,539 of the Political Code limits the rate of tolls, wharfage, and dockage to be collected by the Harbor Commissioners, and in speaking of the localities from which these collections can be made, says "on merchandise landed upon

or shipped from the wharves;" "carried on or off the wharves by a vehicle."

Berry street, between Second and Third streets, was no wharf; neither was it a place to or from which anything could be carried in a vehicle; neither was it a place to which any vehicle could come, or along which any vehicle could pass. In other words, Berry street was not in the category of places from which the Harbor Commissioners were authorized to collect wharfage, dockage, and tolls.

The COURT:

Upon authority of *People etc. v. S. F. Gas Co., supra*, the judgment and order denying motion for new trial are affirmed.

THORNTON and MCKEE, JJ., dissented.

[No. 6,868.—In Bank.]

May 30, 1882.

F. W. VOLL ET AL. v. WILLIAM HOLLIS ET AL.

NEW TRIAL—DISMISSAL OF MOTION—ORDER DENYING MOTION—PRACTICE.—

After a notice of intention to move for a new trial had been filed and a statement duly prepared and certified and filed, the Court made an order dismissing the motion for want of prosecution.

Held: The order must be considered as an order denying the motion; and the case is properly here on appeal.

FORCIBLE DETAINER—UNLAWFUL ENTRY—GOOD FAITH—EVIDENCE.—In an action for forcible detainer, evidence is not admissible, on the part of the defendant, to show that the entry was made in good faith and under claim and color of title. Under the Code, all entries on the actual possession of another are unlawful, and the question of good or bad faith, on the part of the defendant, no longer affects the right of the recovery.

ID.—ID.—ID.—ID.—CASES DISTINGUISHED.—*Thompson v. Smith*, 28 Cal. 532; *Shelby v. Houston*, 38 Id. 422, have no application under the provisions of the Code of Civil Procedure.

FORCIBLE ENTRY AND DETAINER—EVIDENCE.—On the trial of an action for forcible entry and detainer, a witness for the plaintiff was asked the question: "State if anything occurred with reference to that crowd of people there, with reference to the Mayor's going on the ground and ordering them to stop?" and the Court excluded the question.

Held: The question should have been allowed. It related to the circumstances of the entry, and was asked to show that it was forcible.

Id.—Id.—The court also ruled out the following questions to a witness of the defendant: "During that time, there was a litigation pending in regard to this property between you and Mr. Voll?" "Was there not a suit brought by yourself in the Twelfth District Court to quiet title, in which you set up this very possession against Mr. Voll?"

Held: The questions were proper. They had reference to the relations between the witness and the plaintiff Voll, and were asked to show a state of feeling by witness towards Voll, as to which the questions were allowable. The Court erred in sustaining the objections.

APPEAL from a judgment for the defendants, and from an order denying a new trial, in the County Court of the City and County of San Francisco. WRIGHT, J.

George Turner, and McClure, Dwinelle & Plaisance, for Appellants.

An order dismissing a motion for a new trial is, in effect, a denial of the motion. (*Warden v. Mendocino County*, 32 Cal. 655; *Griffith v. Gruner*, 47 id. 644.)

The Court erred in admitting evidence to show that defendant Hale claimed the lot in controversy under the objection of plaintiff's counsel.

The title to the property involved in an action for forcible entry can not be tried therein; and whatever may be the nature of the claim which a defendant may make to the land forcibly entered upon, it can not avail him in his defense. (*Mitchell v. Davis*, 23 Cal. 381.) The Court erred in allowing the introduction of title deeds of defendants Hale and Hollis to the lot in controversy, under the objection of plaintiffs' counsel. Title deeds are not admissible when plaintiff relies upon a forcible entry and detainer. (*Thompson v. Smith*, 28 Cal. 527; *McCauley v. Weller*, 12 id. 500.)

Jarboe & Harrison, for Respondents.

The motion for a new trial was dismissed for want of prosecution. There is nothing in the record tending to show that the Court in so doing did not exercise a proper discretion, and in the absence of such showing its action should be sustained. (*Mahony v. Wilson*, 15 Cal. 42; *Frank v. Doane*, 15 id. 302; *Boggs v. Clark*, 37 id. 236.)

The plaintiff's counted in their complaint upon an unlawful entry upon the lot by the defendants in the absence of

the plaintiffs, as well as for a forcible entry. The defendants claimed to be the owners of the land, and that their entry was in good faith and peaceable. Upon this issue the defendants offered testimony tending to support their claim, such as the ownership and prior occupation by Butler from 1869 to 1875, his conveyance to Hale, the occupancy of the lot by Hale under that conveyance, as well as his claim to be the owner of the land, and the deed from Hale to Hollis. Such evidence was clearly admissible. (*Thompson v. Smith*, 28 Cal. 532; *Shelby v. Houston*, 38 id. 422.)

Jarboe & Harrison, for Respondents. On petition for rehearing.

In an action for statutory "forcible detainer," when the question of actual force is not in issue, but the only question to be determined is whether the entry was "unlawful" if made "during the absence of the occupant," the defendant should be permitted to show his right of entry. If he has the right of entry it can not be "unlawful;" and if he enters in good faith under the belief that he has the right of entry, such entry is not "unlawful" within the meaning of the statute.

For the purpose of determining whether his entry was in "good faith," he should be allowed to show the reasons for his belief that he had the right of entry.

We concede what the Court says in its opinion, viz.: "Title is not in issue or controversy in this action," but we contend for what was said by the Court in *Thompson v. Smith*, 28 Cal. 532, viz.: "The conveyances were admissible, not for the purpose of establishing title, but to show that the entry was made in good faith and under claim and color of title, and therefore not unlawful, within the meaning of the term as used in the Act under which the suit was brought." This has been the uniform language of the Supreme Court of this State whenever this question has been before it.

In this connection, we ask the Court to compare Section 1,172 of the Code of Civil Procedure with Section 9 of the Forcible Entry Act (Stat. of 1865-6, p. 770), under which the former decisions of the Supreme Court were made. From a comparison of the statutes, it is evident, we think, that the

law upon the subject of forcible entry and detainer is the same now as it has been since the passage of the Act of 1865-6, and if so, that the same "elements in a defense to a forcible detainer" exist under the Code as existed under the Act of 1865-6. (*Thompson v. Smith*, 28 Cal. 532; *Shelby v. Houston*, 38 id. 422; *Dennis v. Wood*, 48 id. 361; *Phoenix M. & M. Co. v. Lawrence*, 55 id. 143; *Janson v. Brooks*, 29 id. 221; *Dickinson v. Maguire*, 9 id. 48.)

THORNTON, J.:

This action is brought to recover possession of a lot in San Francisco. It was brought under the provisions of the Code of Civil Procedure contained in Chapter iv, Part III, Title III of that Code. The complaint contains two counts, one for a forcible entry and the other for a forcible detainer. The cause was tried by the Court without a jury, and judgment was rendered for defendants. The plaintiffs moved for a new trial, and on the third day of October, 1879, this motion was, on motion of defendants' attorney, no one appearing for plaintiffs, dismissed for want of prosecution. An order was entered to that effect. An appeal is prosecuted by the plaintiffs from the judgment and "from the order refusing a new trial."

The judgment was entered on the twentieth day of July, 1878, and the appeal from it was taken on the fifteenth of October, 1879. This appeal from the judgment having been taken more than a year after the same was entered, can not be considered, and must be dismissed. (C. C. P., § 939.)

It is argued that the motion of a new trial having been dismissed for want of prosecution by the Court below in the exercise of a proper discretion, the appeal from it should not be considered. At the time the order was made a statement on this motion was on file, which, according to a stipulation appearing in the transcript, is correct, and was filed in time and the order should not have been made. (*Warden v. Mendocino County*, 32 Cal. 655; *Calderwood v. Peyser*, 42 id. 111, 151.) The order of the third of October, 1879, dismissing plaintiff's motion, must be considered as denying it. Such an order was so construed in *Warden v. Mendocino County*, *ut supra*, and we shall follow the ruling in that case. The case, then,

is properly here on appeal from the order of the third of October, 1879, which, in effect denied the motion for a new trial.

On the argument, our attention was called to several points, but we do not consider it necessary to notice all of them.

Evidence was admitted, against the objection and exception of plaintiffs, that one Hale claimed to be owner of the land in controversy. The defendants also offered in evidence a deed from E. S. and Lamson Walden to William Hale, dated the twenty-fifth of September, 1875, for the property in controversy, and also a deed from William Hale to defendant Hollis, dated the thirty-first of July, 1876, for the same property. The plaintiffs objected to the foregoing evidence on the ground that it was immaterial, incompetent, and irrelevant. The objection was overruled, and plaintiffs excepted.

We can not see that there was any ground for the admissibility of the testimony just above stated. Title is not in issue or controversy in this action (C. C. P., § 1,172), and the Court erred in its ruling admitting the testimony. (*McCauley v. Weller*, 12 Cal. 500; *Mitchell v. Davis*, 23 id. 381.)

In *McCauley v. Weller*, just cited, it was held that "the action of forcible entry and detainer is a summary proceeding to recover possession of premises forcibly or unlawfully detained. The inquiry in such cases is confined to the actual, peaceable possession of the plaintiff and the unlawful or forcible ouster or detention by defendant—the object of the law being to prevent the disturbance of the public peace, by the forcible assertion of a private right. Questions of title or right of possession can not arise; a forcible entry upon the actual possession of plaintiff being proven, he would be entitled to restitution, though the fee-simple title and present right of possession are shown to be in the defendant. The authorities on this point are numerous and uniform."

In *Mitchell v. Davis*, cited above, the Court made use of the following remarks, which are particularly applicable here: "If the defendant has any title or right of possession to the land, it must be tried in some action proper for trying such questions; but the present is not an action of that kind. He was not justified in attempting to enforce any such right by taking forcible possession of the land in dispute. He must first deliver up the possession thus forcibly acquired, and then

he may be in a situation to litigate, in a proper action, any valid right or title he may have to the land. One great object of the Forcible Entry Act is to prevent even rightful owners from taking the law into their own hands and attempting to recover by violence what the remedial process of a Court would give them in a peaceful mode."

This we think is a proper construction of Section 1,172, C. C. P., on this subject, which applies alike to an action for a *forcible entry*, or for a *forcible detainer*, which section is as follows: "On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defense that he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together next before the commencement of the proceedings, and that his interest therein is not then ended or determined; and such showing is a bar to the proceedings."

A *forcible entry* is defined in Section 1,159, C. C. P., and a *forcible detainer* in Section 1,160 of same Code.

The remarks cited above from *McCauley v. Weller* and *Mitchell v. Davis* apply to both actions. The remedy was intended to prohibit persons from *taking the law into their own hands*, and thus to repress violence. Such a proceeding constitutes a public offense, and it is made a misdemeanor by Section 418 of the Penal Code.

We can not see that *good faith* constitutes an element in a defense to a forcible entry or a forcible detainer, under the provisions of the Code of Civil Procedure above referred to, nor that an entry made peaceably and in good faith cuts any figure in a defense to a forcible detainer. In either action, the defense is limited as in Section 1,172, C. C. P., above cited.

Whether the cases in which it was held that a defendant charged with an "unlawful" entry and forcible detainer might introduce a conveyance to him of the premises as evidence that his entry was in *good faith*, and therefore not unlawful

within the peculiar meaning given to that word by the decisions referred to by counsel for respondents, and mentioned below, be correct or not, under the statute as it then was such conveyance is not admissible under the provisions of the C. C. P., which treats only of forcible and peaceable entries. Under the Code, all entries on the actual possession of another are unlawful, and the question of good or bad faith on the part of the defendant no longer affects the right of the recovery in this form of action.

The rulings to that effect in the cases referred to by counsel for respondents—*Thompson v. Smith*, 28 Cal. 532, and *Shelby v. Houston*, 38 id. 422—have no application under the provisions of the Code of Civil Procedure, which were in force when this action was brought and tried.

The decisions of the Courts of New York under a statute substantially similar to the statute of this State are in accord with the views herein expressed. (*Carter v. Newbold*, 7 How. Pr. 166–170; *The People v. Van Nostrand*, 9 Wend. 50; *Porter v. The People*, 7 How. Pr. 441; *People v. Fields*, 1 Lans. 222–233; *People v. Leonard*, 11 Johns. 404; *Wells v. De Leyer*, 1 Daly, 39–46; 2 N. Y. Rev. Stats. 507, Sec. 11; see Taylor's Landlord and Tenant, c. xvi.)

Mrs. Lotta A. Roberts was called for plaintiffs, who gave testimony as to the forcible entry upon and taking possession of the lots in controversy in August, 1876. On the re-direct examination she was asked as follows: "State if anything occurred with reference to that crowd of people there, with reference to the Mayor's going on the ground and ordering them to stop?"

This inquiry was objected to by the defense, as immaterial and irrelevant, and the objection was sustained. To this ruling plaintiffs excepted.

This question should have been allowed. It related to the circumstance of the entry, and was asked to show that it was forcible. The Court erred in excluding it.

C. C. Butler was called as a witness by the defendants. On his cross-examination he was asked: "During that time there was a litigation pending in regard to this property between you and Mr. Voll?" Defendants objected to this question as

immaterial, irrelevant, and incompetent. Objection sustained, and plaintiffs excepted.

This question was proper. It had reference to the relations between the witness and the plaintiff Voll, and was asked to show a state of feeling by witness toward Voll, as to which the question was allowable. The Court erred in sustaining the objection.

The same is true as to another question also put to the witness which was excluded on objection of defendants that it was *irrelevant* and *immaterial*. The question referred to was as follows: "Was there not a suit brought by yourself in the Twelfth District Court to quiet title, in which you set up this very possession against Mr. Voll?"

We find no other errors in the points discussed; but for the errors above pointed out, the order which denied the motion of defendants for a new trial, is reversed and the cause remanded to the Superior Court of the City and County of San Francisco to be tried anew.

MYRICK, MCKINSTRY, SHARPSTEIN, and MCKEE, JJ. and MORRISON, C. J. concurred.

[No. 8,484.—In Bank.]

June 2, 1882.

CUNNINGHAM v. SUPERIOR COURT OF SANTA CRUZ COUNTY.

AFFIDAVIT UPON APPLICATION FOR WRIT OF CERTIORARI—PETITION.—The affidavit upon an application for a writ of *certiorari* stated in effect that judgment had been rendered in a Superior Court against the plaintiff for the sum of one hundred dollars and eighty cents for goods sold, etc., and that the said judgment is in excess of the jurisdiction of the said Court. *Held:* It does not appear from the petition, that the Court had not jurisdiction. The action may have been commenced in a Justice's Court, and appealed to the Superior Court.

APPLICATION for a writ of *certiorari*.

The material parts of the affidavit filed upon the application for the writ, were as follows:

James F. Cunningham, the petitioner above named, being duly sworn, says: That he was the defendant in a certain action heretofore pending in the Superior Court of Santa Cruz County. That said action was commenced by Grover & Co., who, on the fourth day of April, 1882, did file the following amended complaint in said action. * * *

(Here follow allegations, in two counts, of an aggregate indebtedness from defendant to plaintiff of one hundred dollars and eighty cents, for goods sold, etc.)

And thereupon, on the twenty-fifth day of April, 1882, in the said respondent's Superior Court, a judgment was rendered and entered against said petitioner, which judgment is as follows, to wit:

(Here follows judgment for amount prayed for.)

That in rendering and entering said judgment, the said Superior Court of Santa Cruz County, and the Judge thereof, exceeded their jurisdiction, and the said judgment is in excess of the jurisdiction of said Court and of the Judge thereof, as appears on the face thereof.

That the rendering and entry of said judgment on said amended complaint was and is in excess of the jurisdiction of said Superior Court.

The petitioner further avers:

That there is no appeal from said judgment, and petitioner has not any plain, speedy, and adequate remedy. That the plaintiff in said action, to wit: the said Grover & Co., have threatened and are about to enforce the said judgment, and, as petitioner believes, will so do, unless the respondents be ordered to desist from further proceedings in said matter.

J. M. Lesser, for plaintiff.

The Court:

The application for a writ of review is denied, upon the ground that it does not appear from the petition that the Superior Court had not jurisdiction to try the action referred to in the petition. It does not appear that the action was commenced in the Superior Court. It may have been commenced in a Justice's Court, and appealed to the Superior Court.

[No. 8,322.—Department Two.]

June 6, 1882.

GEORGE JOHNSON v. THE SUPERIOR COURT OF
THE CITY AND COUNTY OF SAN FRANCISCO.

SUBSTITUTION OF PARTIES IN ACTION—ADMINISTRATOR.—*Certiorari* to review a judgment of the Superior Court upon appeal from a Justice's Court. Judgment affirmed.

APPLICATION for writ of *certiorari*.

The facts were as stated in the petition of the attorneys for plaintiff for a hearing in bank.

No briefs on file.

Flint & Stone, for Plaintiff. Petition to hear cause in bank.

The original plaintiff in the action, the proceedings in which are sought to be reviewed, was Samuel C. Harding. The judgment in the action was in favor of "Samuel Newman, as administrator, with the will annexed of Samuel C. Harding, deceased," whom, it is alleged, was not a party to the action. The only order of substitution attempted to be made in the case of *Samuel C. Harding v. George Johnson* appears in the record, and is as follows:

"In the Superior Court, City and County of San Francisco, State of California. *Samuel C. Harding v. George Johnson*. In open Court, August 10, 1882. No. 322. In this cause, on motion of E. B. Drake, Esq., attorney for plaintiff, and suggestion of death of plaintiff, it is ordered that Samuel Newman be and he is hereby substituted as plaintiff."

The COURT:

The grounds upon which the writ of review was prayed and granted, were that in the action of Samuel C. Harding against the petitioner the complaint did not state facts sufficient to constitute a cause of action; and that a judgment was rendered in favor of one Newman, who was not a party to the action. Neither ground is tenable. The complaint states

sufficient to give the Court jurisdiction, and the record shows that on motion of plaintiff's attorney and suggestion of the death of Harding, the original plaintiff, said Newman, administrator of Harding's estate, was duly substituted as plaintiff in the action.

Judgment affirmed.

[No. 8,321.—Department One.]

June 13, 1882.

MARTHA BROWN v. JOHN A. BROWN.

DIVORCE—DIVISION OF COMMUNITY PROPERTY—POWER OF SUPREME COURT—

APPEAL.—In an action for divorce upon the grounds of extreme cruelty and adultery, the Court found for the plaintiff on the former, and against her on the latter issue; and rendered judgment granting the divorce and dividing the community property equally between the parties. Upon appeal the plaintiff claimed that she was entitled to a divorce upon both grounds, and also that she was entitled to a larger share of the community property.

Held : It is unnecessary to examine the record with reference to the charge of adultery, as it is competent for the Court to give the plaintiff all the relief under a finding of extreme cruelty that it could give under findings against the defendant upon both charges. The Court erred in not awarding to the plaintiff a larger share of the community property. Case accordingly remanded with instructions to the Court below to modify its decree so as to award to the plaintiff three fourths of the community property.

Id.—*Id.*—*Id.*—*Id.*—Under § 148 C. C. this Court has the power to modify the judgment of the Court below in an action for divorce with respect to the distribution of the community property.

APPEAL by the plaintiff from a judgment for the plaintiff, and from an order denying a new trial, in the Superior Court of Los Angeles County. SEPULVEDA, J.

Bicknell & White, for Appellant.

The Court erred in dividing the property. Treating the entire estate as belonging to the community, and granting, for the time being, that the Court has found upon all the material issues, still plaintiff claims that she has been grossly wronged by the decree as entered.

We attract attention to the whole of Section 146, Civil Code, and also to Section 148 of the same Code. This latter pro-

1. *Bovo v. Bovo*, 63 Cal. 78; *Sharon v. Sharon*, 67 Cal. 212.

vision was evidently intended to vest in the appellate tribunal more than ordinary authority in such cases.

We believe we have proven a clear case of adultery. The Court below found that we had made out a cause of action on the extreme cruelty charged. Look at our complaint, and then at the evidence, and deny, who can, that we have established all our allegations on this branch?

Thom & Stephens, for Respondent.

We take it there is nothing in the suggestion (under the circumstances of this case) that this Court has the "power to modify the decree to such an extent as to award to plaintiff the first parcel of land described in the complaint, and the personalty thereto pertaining," under Section 146, Civil Code.

The COURT:

Plaintiff brought this suit against the defendant for a divorce, on the grounds of adultery and extreme cruelty. The Court found against the defendant on the question of extreme cruelty, and for him on the other charge, and made an equal distribution of the community property between the parties. The plaintiff appeals, and claims that she was entitled, under the evidence in the case, to a divorce on both grounds, and she also claims that she was entitled to a larger share of the community property than was awarded her by the Court.

It is unnecessary for us to examine the record with reference to the charge of adultery, as it is competent for the Court to give the plaintiff all the relief under a finding of extreme cruelty that it could give her under findings against the defendant upon both charges. We think the Court erred in not awarding to the plaintiff a larger share of the community property, and Section 148 of the Civil Code provides that "the disposition of the community property and of the homestead, as above provided, is subject to revision on appeal in all particulars."

The judgment of the Court below in granting the plaintiff a divorce is affirmed, and the case is remanded, with instructions to the Court below to modify and amend its decree so as to award to the plaintiff three fourths of the community property.

[No. 10,632.—Department One.]

June 21, 1882.

THE PEOPLE v. GEORGE A. WHEELER.

MURDER—TRIAL—ARGUMENT—READING FROM BOOK ON MEDICAL JURISPRUDENCE.—Upon the trial of an information for murder, the District Attorney, in his closing argument to the jury, said he would read, "as a portion of his argument," from a book called "Browne's Medical Jurisprudence of Insanity." No testimony had been introduced to show that this was a recognized work or standard authority, or that it was a scientific work. The defense objected to said book, or any part thereof, or to any opinion of said alleged writer, on the ground that it had not been established to be a scientific work, or a standard or recognized authority, and that it was *incompetent*. The Court overruled the objections, and defense excepted; and the District Attorney did read from the book various sections thereof, commenting upon and treating of the subject of insanity, and sustaining the prosecution's theory of the case.

Held: The Court erred in permitting the District Attorney to read the extracts referred to.

CASES OVERRULED.—*Harvey v. State*, 40 Ind. 516, disapproved.

APPEAL from a judgment of conviction and from an order denying a new trial, and from an order denying a motion in arrest of judgment, in the Superior Court of the City and County of San Francisco. FERRAL, J.

Darwin & Murphy, for Appellant.

We claim that no well considered criminal case can be found in which medical books have been admitted in evidence or been permitted to be read to a jury, in argument or otherwise, in support of the case of the people, without proof of their being standard authorities, or by consent of the defendant. (1 Greenl. Ev., Sec. 440 a, p. 487; Redfield, 12th ed.; 2 Bishop Cr. Prac., Sec. 686, p. 380, 2d ed.; Elwell's Med. Juris., c. xxiii., p. 331; Whart. Cr. Ev., Sec. 538, p. 437; id., Sec. 407, p. 320; *Commonwealth v. Wilson*, 1 Gray (67 Mass.), 338; *Washburn v. Cuddihy*, 8 Gray (74 Mass.), 430; *Commonwealth v. Sturtivant*, 117 Mass. 139; *Commonwealth v. Brown*, 121 id. 81; *Ashworth v. Kittridge*, 12 Cush. (66 Mass.) 194; *Regina v. Crouch*, 1 Cox Cr. Cases, 94; *Regina v. Taylor*, 13 id. 77; *Collier v. Simpson*, 5 Carr & P. 74; *Cocks v. Purday*, 2 Carr. & K. 269; *State v. O'Brien*, 7 R. I. 336; *Yoe v. The People*, 49 Ill. Rep. 412.)

1. *People v. Mitchell*, 62 Cal. 412; *Gallagher v. Market St. Ry.*, 67 Cal. 14.

A. L. Hart, Attorney General, for Respondent.

It is claimed that it was error for the Court to permit the Assistant District Attorney, in his closing argument, to read from Browne's Medical Jurisprudence of Insanity. The parts read were not presented to the jury as evidence, but were adopted as part of the counsel's argument. The defense was insanity, and some circumstances had been proven with a view of arguing that they were evidences of a diseased mind, and the District Attorney, in his argument, quoted and adopted the reasoning of the learned author upon the subject. Much conflict exists upon the subject of the right of counsel to read from such works, but it is submitted that the weight of authority is on the side of the right of counsel to adopt the reasoning of any author or person in his address to the Court, or jury. (*People v. Anderson*, 44 Cal. 65.)

Courts also take judicial notice of the laws of nature, whether those laws be applicable to animate or inanimate objects, to mind or matter; and hence it is not improper in an argument to a Court to read works of science as well as of law, not as establishing facts, but as exhibiting distinct processes of reasoning which the Court or jury, from its own knowledge thus refreshed, is able to pursue. (C. C. P., § 1875, Subd. 8; Whart. Crim. Ev., 538; Wharton on Evidence, 282, 235; *Harvey v. State*, 40 Ind. 516; *State v. Spencer*, 1 Zab. 208; *Luning v. State of Wisconsin*, 1 Chandler, 270; *Legg v. Drake*, 1 Ohio St. 286.)

If the defendant desired an instruction from the Court to the effect that such quotations were not evidence, it was his duty to ask for it; and not having asked for it, he can not, in this Court, take advantage of the failure of the Court to so instruct the jury. (*Williams v. Hartford Ins. Co.*, 54 Cal. 442.)

McKINSTRY, J.:

This cause was submitted for decision June 5, 1882.

The District Attorney, in his closing argument to the jury, said he would read, "as a portion of his argument," from a book called "Browne's Medical Jurisprudence of Insanity." The bill of exceptions proceeds: "No testimony had been introduced to show that this was a recognized work or standard

authority, or that it was a scientific work. The defense objected to said book, or any part thereof, or to any opinion of said alleged writer, on the ground that it had not been established to be a scientific work, or a standard or recognized authority, and that it was *incompetent*. The Court overruled the objections, and defense then and there duly excepted. And the District Attorney did read from said book various sections thereof, commenting upon and treating of the subject of insanity, *and sustaining the prosecution's theory of the case.*"

An expert has sometimes been defined to be a witness who testifies to conclusions from facts, while an ordinary witness testifies only as to facts. Mr. Wharton thinks this definition not sufficiently exact, since no witness called to facts reproduces them precisely as they exist; more or less of inference being mingled with almost every detail of ordinary observations. "The true distinction is this, the non-expert testifies as to a subject-matter readily mastered by the adjudicating tribunal; the expert to conclusions outside of such range. The non-expert gives the result of a process of reasoning familiar to every-day life; the expert gives the result of a process of reasoning which can be mastered only by special scientists." (Criminal Evidence, 404.) Whatever the exact distinction, it is well settled that where the object is to ascertain whether a *supposed case* is to be regarded as indicating *insanity*, only experts in insanity are to be called, since only experts are competent to describe the differentia of insanity scientifically. (Id. 417, cases cited.)

But the question in the particular case "sane or insane," is a question of fact for the jury. The expert is called to assist the jury in reaching a just conclusion; his testimony is necessarily subject to the supervision of the jury. They must determine, not only whether the hypothetical case on which his opinion is based is the case before them, as established by credible testimony, but must consider the reasons he has given for his opinions, and by his whole testimony test his credibility and the correctness of his judgment. Inasmuch as the circumstances on which the jury are to determine the weight to be given the opinion of an expert are more numerous and complicated than those by reference to which

they are to decide on the consideration to be accorded to the statements of a witness with respect to facts, and inferences involved, if any, which are within the reach of those possessed of no special or scientific acquirements, it follows that it is peculiarly important that a defendant charged with crime should be "confronted" by the expert witnesses against him, and that they should be cross-examined in his presence. But where the opinions of a writer as to the presence or absence of insanity, upon facts more or less analogous to those claimed by the prosecution or defense to be established in the case, are permitted to go to the jury, the writer is not sworn or cross-examined at all. Such evidence is equally objectionable, whether introduced by the people or by the defendant. If held admissible, the question of insanity may be tried, not by the testimony, but upon excerpts from works presenting partial views of variant and perhaps contradictory theories. In the case before us, too, there was no evidence that the work from which the District Attorney read "various" sections was a standard authority in the medical profession, or that the author was an *expert*.

Medical books are not admissible as evidence. The contrary was at one time held in Iowa and Alabama. The Iowa decision (*Bowman v. Woods*, 1 G. Greene Rep. 445) was based upon the idea that inasmuch as the opinions of medical witnesses are formed in part upon the books they may have read, the books themselves are "better evidence." A reference to what is said hereafter as to the reasons for rejecting such books will point out the fallacy on which the conclusion of the Iowa Court was based. In *Bowman v. Woods* it was conceded that the admission of such books is not in conformity to the prevailing decisions. The Alabama case (*Stoudenmeier v. Williamson*, 29 Ala. 558) will be hereinafter noticed.

Medical witnesses, as observed by Briand, "do not usurp the functions, but serve to enlighten the conscience of the Judge and jury." The practice is to ask the opinion of the expert, upon a hypothetical state of facts, but not to permit him to quote from books of authority in his profession to fortify his opinion. Against this exclusion of written authorities medical men have protested very vehemently. As long ago as the trial of Spencer Cowper, Doctor Crell remon-

strated with the Bench when it was intimated that the practice of reading from books was improper. In Beck's Medical Jurisprudence (Vol. 2, p. 963), is a citation from an article in the *Edinburgh Medical and Surgical Journal*, where the editors say: "It appears to us no one can follow this advice" (not to read from medical treatises in giving testimony) "without compromising the right and dignity of his profession as well as the force of his evidence, for it would not be difficult to show that medical evidence is little else than a reference to authority." But one of the editors of the Revision of Beck by Gilman shows (Vol. 2, p. 963), that the effect of the rule is not to deprive parties of medical or scientific evidence, but that Tindal's *dictum*, in *Collier v. Simpson*, 5 C. & P. 74, opened the door wide enough to satisfy any reasonable man. "You may ask," said that Judge, "the witness whether in the course of his reading he has found this laid down; you may ask him his judgment and *the grounds of it*, which may in some degree, be founded upon books as part of his general knowledge."

A similar rule obtains with respect to a witness called to prove a foreign law; he should state, on his responsibility, what the foreign law is, and not read fragments of a foreign code. (*Cocks v. Purday*, 2 Carr. & K. 269.)

But while a witness can not be permitted to read, as independent proof, extracts from books in his department, he may refresh his memory, when giving the conclusions arrived at in his specialty, by turning to standard works. (1 Whart. L. Ev. 438.) And, as we shall see hereafter, it would seem to have been held in Wisconsin that a witness having cited scientific authorities, they may be put in evidence to discredit him.

Quotations from medical books are not admissible as evidence when offered independently, or when read by witnesses. It follows that counsel ought not to be allowed to read such to the jury; *a fortiori* when they are not proved to come from works of standard authority in the profession. A general history may be read from, but this is only to refresh the memory of the Court as to something it is supposed to know. So, under appropriate restrictions, domestic law books are permitted to be read to the jury. The Court can always cor-

fect the counsel as to his law, or the application of it. But the opinions of medical experts are in their nature *facts*, to be established by living witnesses. They can not be proved by hearsay alleged to come from those not present, and not even shown to be competent to express scientific opinions. Nor are they established by the mere statement of counsel.

The full report of *The Queen v. Crouch*, 1 Cox's Cr. cases, 94, is as follows:

"The prisoner was indicted for the willful murder of his wife, and the defense set up was that of insanity.

"Clarkson, for the prisoner, in his address to the jury, attempted to quote from a work entitled 'Cooper's Surgery,' the author's opinions on the subject.

"Alderson, B., thought that he was not justified in doing so.

"Clarkson—I quote it, my Lord, as embodying the sentiments of one who has studied the subject, and submit that it is admissible in the same way as opinions of scientific men on matters appertaining to foreign law may be given in evidence.

"Alderson, B.—I should not allow you to read a work on *foreign* law. Any person who was properly conversant with it might be examined, but then he adds his own personal knowledge and experience to the information he may have derived from books. We must have the evidence of individuals, not their written opinions. We should be *inundated* with books if we were to hold otherwise.

"Clarkson—I shall prove the book to be one of high authority.

"Alderson, B.—But can that mend the matter? You surely cannot contend that you may give the book in *evidence*, and if not, what right have you to quote from it in your address, and do that indirectly which you would not be permitted to do in the ordinary course?

"Clarkson—It was certainly done, my Lord, in *Naughten's case*.

"Alderson, B.—And that shows still more strongly the necessity for a stringent adherence to the rules laid down for our observance. But for the non-interposition of the Judge in that case, you would not probably have thought it necessary to make this struggle now."

And in *Regina v. Taylor*, 13 Cox's Cr. Cases, 77, it was

held: "Cases cited in books on medical jurisprudence are not admissible even to form part of an address to the jury." Counsel for defense, in addressing the jury, proposed to read from Taylor's Medical Jurisprudence. Brett, J., said: "This is no evidence in a Court of Justice. It is a mere statement by a medical man of hearsay facts of cases at which he was in all probability not present."

To the same effect are the American cases in which the question is fully considered and decided. In *State v. O'Brien*, 7 R. I. 338, the Court said: "The book offered to be read to the jury was not admissible as evidence. No evidence in the nature of parol testimony could properly pass to them, except under the sanction of an oath; and upon this ground books of science are excluded, notwithstanding the opinion of scientific men that they are books of authority and valuable as treatises. Scientific men are permitted to give their opinions as experts, because given under oath, but the books which they write containing them are, for want of such oath, excluded."

The suggestion, that such books may be read "as part of the argument of counsel," did not receive much consideration from Chief Justice Shaw, in *Ashworth v. Kittridge*, 12 Cush. 193 (66 Mass.) That distinguished Judge there said: "The Court are of opinion that it was not competent for counsel for the plaintiff, against the objection of the other side, to read medical books to the jury. * * * We consider the law to this effect to be well settled, both upon principle and authority. When books are thus offered, *they are, in effect, used as evidence*, and the substantial objection is that they are statements wanting the sanction of an oath; and the statement thus proposed, is made by one not present and not liable to cross-examination. If this same author were cross-examined and asked to state the grounds of his opinion, he might himself alter or modify it, and it would be tested by a comparison with the opinions of others. Medical writers, like writers in other departments of science, have their various and conflicting theories, and often sustain and defend them with ingenuity. But as the whole range of medical literature is not open to persons of common experience, a passage may be found in one book favorable to a particular opinion, when, perhaps, the same opinion may have been

vigorously contested, and, perhaps, triumphantly overthrown by other medical writers, but authors whose works would not be likely to be known to counsel or client, or to Court or jury. Besides, medical science has its own nomenclature, its technical terms and words of art, and also common words used in a peculiar manner, distinct from their received meaning in the general use of the language. From these and other causes, a person not versed in medical literature, though having a good knowledge of the general use of the English language, would be in danger, without an interpreter, of misapprehending the true meaning of the author. Whereas, a medical witness would not only give the fact of his opinion, and the grounds on which it is formed, under the sanction of his oath, but would also state and explain it in language intelligible to men of common experience. If it be said that no books should be read except books of good and established authority, the difficulty at once arises as to the question what constitutes 'good authority;' more especially whether it is a question of competency, to be decided by the Court, whether the particular book shall be received or rejected; or a question of weight of testimony, so that any book may be read, leaving its weight, force, and effect to the jury. Either of these alternatives would be attended with obvious, if not insuperable objections."

And in *Commonwealth v. Wilson*, indicted for murder, 1 Gray, 338, the learned Chief Justice also said: "Opinions on the subject of insanity cannot be laid before the jury except under the oath of persons skilled in such matters. Whether stated in the language of the Court or of the counsel in a former case, or cited from the works of legal or medical writers, they are still statements of fact and must be proved on oath."

These views are reaffirmed in *Washburn v. Cuddihy*, 8 Gray, 431, and in *Commonwealth v. Brown*, 121 Mass., 81. So, also, it was held in *Commonwealth v. Sturtivant*, 117 Mass. 139, that an expert should not be allowed to read extracts from a work on medical jurisprudence.

Dicta are to be found in the reports of the Courts of several of the States which, disconnected from the context, would seem to support the proposition that counsel may be permitted

to read from medical works of established credit in the profession "as part of his argument." But in one only of the cases, so far as we have been able to find, was it decided that this practice was proper, such decision being necessary to the conclusion reached by the Court.

In *Yoe v. People*, 49 Ill. 412, it was said, that where the attorney for The People, against the objection of the prisoner, read copious extracts from medical works, the Court (without special request on the part of the prisoner) should have instructed the jury that such books are not evidence, but theories simply of medical men. Even if we should accept this as law, the judgment in the present case must be reversed, since the Court below did not so instruct the jury. In *Yoe v. The People*, the reading of such books by the attorney for the People (in the absence of the instruction mentioned) was held to be error, and the judgment was reversed. In our view the Court came to the proper conclusion—that error had occurred.

But books treating of insanity contain more than abstract speculations or general expositions of the science of medicine as applicable to mental diseases. They contain reported cases and opinions as to the effect to be given to asserted facts in determining the presence or absence of insanity; statements of the views and opinions of their writers, which partake of the nature of facts in the same degree as do the opinions of expert witnesses, who are subject to cross-examination. *Harvey v. The State*, 40 Ind. 516, was a case in which it was held not to be error for the trial Court to permit counsel to read from a book purporting to be a medical work, the Court, instructing the jury "that the extract was to be regarded not in anywise as evidence," etc. The objections to the practice so clearly pointed out by Chief Justice Shaw and others do not seem to have occurred to the Judges; and the Court, in *Harvey v. The State*, supposed that any evil which might arise from it would be overcome by the direction to the jury to disregard the extract as evidence. In the case at bar, as we have seen, the Court below did not so instruct the jury. It has been held here that ordinarily a judgment will not be reversed because of the omission of the trial Court to give a certain instruction unless the instruction was requested. But

the rule certainly would not be applicable to a case in which counsel should be permitted to state facts not in evidence to a jury, against the objection of the opposite party. (See *People v. Taylor*, 59 Cal. 640.) Here the District Attorney was permitted to read the opinions of one whose opinions (even if we assume the book to be of recognized authority) were, like the opinions of experts upon the witness stand, in the nature of facts.

We do not think *Harvey v. The State* was well decided; but if it can be considered law, it will not justify an affirmation of the judgment in the case now before us. In *Legg v. Drake*, 1 Ohio St. 286, the bill of exceptions did not show that the passage from Youatt's work on "Veterinary Surgery," which counsel was prevented by the Court from reading to the jury, had any relevancy to the cause on trial. The action of the Court below in refusing to permit it to be read, was sustained for this reason; as if the Supreme Court had said: "Assuming that passages from such works may properly be read, they should at least have some bearing on the issue being tried." What is said in the opinion of the propriety of the practice, is mere *dictum* (p. 289). The bill of exceptions before us shows, that the sections read by the District Attorney to the jury, from Browne's work, were relevant. He read "various sections thereof, commenting upon and treating of the subject of insanity, and sustaining the prosecution's theory of the case." Moreover, in *Legg v. Drake*, the Court only said: "Although unlimited license in range and extent is not allowed to counsel, in their addresses to the Court and jury, yet no pertinent and legitimate process of argumentation, within the appropriate time allowed, should be restricted or prohibited. And it is not to be denied, that a pertinent quotation or extract from a work on science or art, as well as from a classical, historical, or other publication, may, by way of argument, or illustration, be not only admissible, but sometimes highly proper. * * * It would be an abuse of this privilege, however, to make it the pretense of getting improper matter before the jury as evidence in the cause." A pertinent quotation, used by way of illustration, is a very different thing from a report of facts connected with a particular case, and the opinion of an author thereon that

they did not indicate or establish insanity; a different thing from the reading the opinion of a medical writer as to the effect of particular facts upon the determination of the question of insanity. Such must be presumed to have been the nature of the matters read by the District Attorney in the present case, since they sustained the prosecution's theory of "the case"—*this case*. The ruling in *Wade v. De Witt* (20 Texas, 401) was based upon a similar bill of exceptions to that before the Ohio Court, in *Legg v. Drake*, and was to the same effect. In *City of Ripon v. Bettel* (30 Wis. 619), the bill of exceptions did not show for what purpose a certain treatise on surgery had been admitted. *Non constat*, said the Court, but a medical expert had stated that the treatise sustained his conclusion, and the book was admitted as evidence in the nature of impeaching testimony, to show that the witness was mistaken.

Mr. Bishop, in his work on Criminal Procedure, Section 1190, says: "An expert may testify to what he has learned, not merely from personal experience and observation, but also from books, and may give an opinion derived from reading and study alone. But it does not follow that the books themselves are evidence. We have seen that the law of the case should be given to the jury by the Judge and not through law books; because the books state the law abstractly, while the jury are to be instructed upon the rules governing the particular facts. For the like reason it is the *better doctrine* that no books of science, or other book of the sort, however high or well attested its authority, should be submitted to the jury. Yet equally in the Judge's charge to the jury, and in the testimony of experts, and even in the arguments of counsel, passages from *standard books*, explained and applied to the case in controversy, are, *under limitations varying in some degree in our different courts*, permitted to be read."

We need not here pause to inquire whether, in view of the clause in our Constitution which prohibits any charge as to facts, a California Judge would be permitted to determine what books are "standard authorities" in the medical profession; to read from such, and to explain and apply their contents. With respect to the statement that passages from

standard books may be read by witnesses, and by them explained and applied, "under limitations varying in some degree," the language employed by the very able writer indicates how difficult he found it to derive any definite rule from the instances where such practice had apparently been permitted. The cases cited by Mr. Bishop are *The State v. Sartor*, 2 Strobh. 60, and *Merkle v. The State*, 37 Ala. 139. In the first it was simply held that, although an indictment for obstructing a highway was at *common law*, it was permissible for the State Solicitor to refer to the public statutes, not to give character to the offense as *against the statute*, but to show what were public ways. 37 Alabama, 139, is based entirely on *Stoudenmeier v. Williamson*, 29 Ala. 566, in which the question considered was not whether an expert could read from medical works, but whether such books could themselves be introduced as evidence. In the opinion in the case last named the only English cases cited are *Collier v. Simpson*, *supra*, and *Attorney General v. The Glass Plate Company*, 1 Anstr. 39.

Of these the first is directly adverse to the proposition that a witness can be allowed to read from scientific treatises; the second—which holds that parol evidence is not admissible to explain the meaning of a word used in an Act of Parliament—is admitted to have no bearing upon the question under consideration. It is further admitted by the learned Alabama Judge that Greenleaf (Vol. 1, Sec. 440, note 5) is an authority against the admissibility of the evidence. Neither the Massachusetts nor Rhode Island cases are mentioned. The American decisions by him referred to are *Bowman v. Woods*, already commented on; *Luning v. The State of Wisconsin*, 1 Chand. 178, spoken of as "a very loose opinion," and *Green v. Cornwell*, 1 City Hall Recorder, 14. In the last, which was a trial by jury in the Mayor's Court of New York city, a table from Blunt's Coast Pilot and Bowditch's Navigator was received to prove the condition of the *tide* at a certain time and place, the presiding Judge saying, "the testimony is of equal validity with the Almanac." But, clearly, *Stoudenmeier v. Williamson* is not authority to the point that a witness may fortify his opinion as expert by reading from books, since that question was not decided in that case. There an extract

from a medical book was itself admitted in evidence, and, as Mr. Bishop says, it is now well settled that the books themselves, or extracts from them, are not admissible as evidence.

If the last clause of the above citation from Bishop is to be construed as implying that counsel can *read* to a jury extracts from medical works, and *explain* them, the great weight of authority is decidedly against so dangerous a license.

In *Merkle v. The State* (*supra*) the book read from by the prosecuting attorney was first proved by the testimony of a practicing physician to be a book "recognized by the medical profession as good authority on all subjects therein treated of." The prosecuting attorney did not read from a book, not introduced in evidence nor proved to be authoritative, as was done in the case now before this Court. In *Merkle v. The State*, the Alameda Court, solely on authority of *Stoudenmeier v. Williamson*, held that it was proper to receive such a book in evidence. This ruling is in conflict with the established law on the subject, as stated by Mr. Bishop himself. As to the other cases referred to in the note to the clause quoted from Bishop, some have been hereinbefore mentioned and commented upon, others have no relevancy to the immediate question. *McMath v. The State*, 55 Ga. 303, only holds, that, under the supervision and subject to the correction of the Court, counsel may read from books treating of the law of this country.

Our conclusion is that the Court below erred in permitting the District Attorney, in his closing argument to the jury, in the absence of any evidence that the work was of recognized authority in the medical profession, and against the objection of counsel for the defendant, to read from Browne's Medical Jurisprudence of Insanity "various sections treating of the subject of insanity, and sustaining the prosecution's theory of the case."

Judgment and order denying new trial reversed, and cause remanded for a new trial.

ROSS, J., concurred.

McKEE, J., concurring :

Books of science or art are *prima facie* evidence of facts of general notoriety and interest. But the Court below erred in

permitting the District Attorney, against the objection of the defendant's counsel, to read to the jury extracts, "commenting upon and treating of the subject of insanity," from a book which was not proved to be a recognized or scientific work, or standard authority—was not offered in evidence in the case, nor made part of the testimony of any of the witnesses examined; and on that ground, I concur in the judgment of reversal.

[No. 7,123.—Department One.]

June 26, 1882.

C. CHAQUETTE, ADMINISTRATOR ETC., v. JEAN ORTET.

SURETIES OF ADMINISTRATOR—ACTION FOR ACCOUNTING—EQUITY.—Where an administrator dies without rendering an account, jurisdiction to compel an accounting vests in the appropriate Court of Equity; and it would seem that the adjustment of the account by that Court is a prerequisite to an action against the sureties.

ID.—ID.—ID.—JUDGMENT AGAINST PRINCIPAL—MAXIM.—In such an action, where the sureties were made parties, but were afterwards dismissed, upon their objection by demurrer to being joined, the decree is conclusive against them, and they can not be heard to object that they were not parties. To this the maxim *alligans contraria non est audiendus* applies.

ID.—ID.—ID.—JUDGMENT.—BREACH OF BOND.—The judgment, in such an action, does not come within the provisions of Section 1504, C. C. P., requiring a copy of the judgment to be filed among the papers of this case, but, so far at least as the enforcement of the payment, it directs against the estate of the deceased, it is to be regarded in the light of a decree of the Probate Court settling the account and directing payment; and the failure of the administratrix of the administrator to make the payment constitutes a breach of the bond, for which the sureties are liable.

JUDGMENT—PLEADING.—In pleading a judgment, it is sufficient to allege that the same remains unpaid and in full force. It is unnecessary to allege that the judgment was never appealed from.

APPEAL by the defendant, Jean Ortet, from a judgment for the plaintiff, in the Superior Court of the City and County of San Francisco.

A. D. Splivalo and Edward J. Pringle, for Appellant.

The decree against the administrator was not conclusive against the sureties. Upon this question there has been much conflict of authority. But this Court has reached a conclu-

1. *In re Alliger*, 65 Cal. 230; *Estate of Curtiss*, 65 Cal. 574; *Welch v. Statham*, 67 Cal. 88.

sion upon the general principle involved, which greatly reduces the field of discussion. (*Pico v. Webster*, 14 Cal. 204; *Irwin v. Backus*, 25 id. 222.)

All the cases which hold these accounts of a Probate Court or Ordinary's Court to be conclusive upon the surety, base their decisions either upon the character of the tribunal, to whose proceedings the executor or administrator is a *quasi* party, or upon the terms of the contract as presumed to contemplate a settlement of accounts in that particular tribunal. The rule is wholly different and the aspect is wholly changed in the case of an ordinary suit at law or in equity, which acts only upon those who are made parties to it. (*Brandt on Suretyship and Guaranty*, secs. 496, 524; *Thomson v. MacGregor*, 11 Reporter, 203; *Estate of Schroeder*, 46 Cal. 304.)

The complaint does not establish a *devastavit* against the principal. Admitting the conclusiveness of the judgment, it only establishes the fact that the deceased administrator had received funds of the estate of his intestate. But the plaintiff has done nothing to collect the amount of the judgment, or to establish that it can not be collected. He can not issue execution, but his duty in that behalf was to "file in the Probate Court, a certified transcript of the judgment" under Section 1504 C. C. P. *Non constat*, but that upon such filing payment would be made. Until such filing, payment could not properly be made, or the deceased administrator proved to have been faithless to his trust.

It does not appear that the decree against the administratrix is not liable to be set aside on motion for new trial, and it does appear that it is liable to be reversed for error. Hence, it can not conclude the rights of the surety.

A. W. Thompson and Baggett & Platt, for Respondent.

In the absence of fraud or collusion, the sureties on the bond of Mitchell were concluded by the judgment against his estate. They were concluded by their contract. The surety upon an administrator's bond expressly makes his liability depend on the event of a litigation to which he is not a party, and stipulates to abide the result. By his contract he makes himself privy to the proceedings against his principal. (*Estate of Aveline*, 53 Cal. 259; *Irwin v. Backus*, 25 id. 222,

225; *Fox v. Minor*, 32 id. 124; *Riddle v. Baker*, 13 id. 306; *Pico v. Webster*, 14 id. 205; *Stovall v. Banks*, 10 Wall. 588; *Ralston v. Wood*, 15 Ill. 170; *Shepard v. Pebbles*, 38 Wis. 378; *Casoni v. Jerome*, 58 N. Y. 321, 322; *Thayer v. Clark*, 48 Barb. 255; *Schofield v. Churchill*, 72 N. Y. 569; *Willey v. Paulk*, 6 Conn. 75; *Towle v. Towle*, 46 N. H. 434; *Fay v. Ames*, 44 Barb. 333; Baylies on Sureties and Guarantors. 140, 141, 400; Brandt on Suretyship, 532, 533, 534; Freeman on Judgments, 180.)

The condition of the bond in the case at bar was that the administrator should "faithfully execute the duties of his trust according to law." This was in the language of the statute, Section 1390, C. C. P. (Williams on Executors, 596; C. C. P., §§ 942, 965.)

They were concluded, though the record does not show that they were nominally parties. A prior judgment may be conclusive upon others than those nominally parties to the record. This rule is made, not so much with a view to possible future controversies, but that matters once at issue should be finally determined. There must be some other ground for refusing to allow a former judgment to be conclusive, than the bare fact that the record does not show that the parties sought to be bound thereby were parties. (*Valentine v. Mahoney*, 37 Cal. 389; *Heard v. Lodge*, 20 Pick. 53; S. C., 32 Am. Dec. 197; *State v. Coste*, 36 Mo. 437, 438; *Boyd v. Caldwell*, 4 Rich. (S. C.) 120; *Stovall v. Banks*, 10 Wall. 588; *Holley v. Acre*, 23 Ala. 608; *Jones v. Ritter*, 56 id. 282; *Irwin v. Backus*, 25 Cal. 222; *Estate of Aveline*, 53 id. 259; *Brown v. Balde*, 3 Lans. 288, 290.)

The record shows that, in the original suit against the administratrix of the estate of Mitchell, the sureties on the bond of Mitchell were made parties, and that they were dismissed from the suit on their own motion. They were not necessary parties. (*Brown v. Balde*, 3 Lans. 287.) They were improperly made parties. In proceedings against an administrator for an account and final settlement of the estate, the sureties in the administration bond are not proper parties. Their liability is upon the bond alone. (Baylies on Sureties and Guarantors, 390; *Smith v. Everett*, 50 Miss. 575; *Willey v. Paulk*, 6 Conn. 75.)

Appellant claims that the complaint should have been held bad on demurrer, because it did not show a *devastavit*, and quotes Brandt on Suretyship, 494. This question is very ably discussed in *Hobbs v. Middleton*, 1 J. J. Marsh. (Ky.) 184. The Court said, in regard to this theory of appellant's, viz., that a *devastavit* can only be established by two suits; that two judgments must be obtained against the principal before the security can be sued: "It is sustained by no known principle of law, and is inconsistent with all analogy and all reason." * * * (C. C. P., §§ 1649, 965; *Young v. Duhme*, 4 Metc. [Ky.] 244; *McCalla's Adm'r v. Patterson*, 18 B. Mon. 207; *Jeeter v. Durham*, 6 J. J. Marsh. 231; Baylies on Sureties and Guarantors, 137, 138.)

There is no force in appellant's point that the complaint should have alleged, that the judgment rendered by the District Court was filed in the Probate Court. (*O'Gorman v. Lindeke*, 1 N. W. Rep. 843.) There is no force in appellant's point that the complaint should have alleged that the judgment had become final, and had not been reversed. The judgment set forth in the complaint was a final judgment. (*Stovall v. Banks*, 10 Wall. 588; *Belt v. Davis*, 1 Cal. 137; *Housh v. People*, 66 Ill. 181; *Estate of Stott*, 52 Cal. 403.)

Edward J. Pringle, for Petitioner on rehearing.

The chief point relied on by the appellant in this case was, that a Court of Equity, being the only tribunal competent to settle his accounts, "should either join all the parties in interest in one suit and settle their common and respective rights, or, if their rights are such that they can not be the subject of a common action, they must be adjudicated separately."

This point is disposed of in the decision of the case by holding that "the appellant was afforded an opportunity to be heard," inasmuch as he had been made a party to the action, and upon his own objection was dismissed therefrom. And the Court decides that he shall not be permitted to "blow hot and cold."

We respectfully submit that this application of the maxim, "*allegans contraria non est audiendus*" can not possibly be appropriate or just, and that it should not be allowed to

become authority. The maxim is of course founded upon the doctrine of estoppel. (See Broom's *Leg. Max.*, 7th ed., 169.) And there is no instance in all the learning upon the subject of estoppel, nor any possible reason, why a man should be held to be estopped from claiming that he is not bound by a decision to which he was not a party merely because he objected that he was not a proper party, and upon such objection was adjudged not to be a proper party.

When this defendant interposed as a defense in law to the equity suit the plea that he was improperly joined with another defendant, the doctrine of "*allegans contraria, etc.*," prevents him from saying afterwards that he was properly joined; but that is all.

In view of the above familiar principles it will be manifest that, so far from the appellant being estopped, by his objections sustained in the other suit, from contesting the finality as against himself of that decision, the effect of the estoppel is just the other way. For when a Court decides that the surety is not a proper party to a bill in equity brought against the administrator of his principal to settle the accounts of the deceased, it is an adjudication to the effect that the judgment shall not conclude him. For, to a bill in equity, all persons interested are proper parties; and when the decision is made and, right or wrong, becomes final, that the surety is not a proper party to a settlement of accounts, that decision inevitably means that he is not to be concluded by such settlement.

Ross, J.:

Eugene Herteman died intestate. T. A. Mitchell was appointed administrator of his estate, and the appellant became surety on his bond. Mitchell died intestate, without having filed any account of his administration of Herteman's estate, and Elizabeth Mitchell was appointed administratrix of the estate of T. A. Mitchell. Subsequently a bill in equity was filed by the respondent herein, as administrator of the estate of Herteman against Elizabeth Mitchell, administratrix, for an accounting of the doings of T. A. Mitchell as administrator of the estate of Herteman. To this bill the sureties on the bond of Mitchell, including the appellant, were made parties.

The sureties (including the appellant) demurred to the bill, and objected to being joined with the administratrix in the action, which objection was sustained by the Court, and, thereupon, they were dismissed therefrom. The action proceeded against the administratrix, and resulted in a decree stating and settling the account, by which it was ascertained and determined that the estate of Mitchell was indebted to the estate of Herteman in the sum of eight thousand four hundred and eighty-two dollars and fourteen cents, in gold coin of the United States, for money received by Mitchell as administrator of the estate of Herteman, with interest, over and above all just charges, claims, and disbursements; and judgment was entered in favor of the plaintiff for that sum. In the complaint in the present action, which is brought against Mitchell's sureties, it is averred that the judgment just mentioned is in full force, and that no payment thereon or upon the indebtedness of Mitchell to the estate of Herteman has ever been made, but the whole thereof remains unpaid; that the estate of Mitchell is insolvent, and that there has never been any property of his estate available for the payment of said indebtedness, and that the plaintiff has exhausted all means at his command to collect the said indebtedness from his estate, but has been unable to do so; and these averments stand admitted by the pleadings. The Court below held the decree in the case of the administrator of the estate of Herteman against the administratrix of the estate of Mitchell conclusive against Mitchell's sureties; and this ruling constitutes the principal ground of the appeal.

The liability of the surety depends upon the liability of the principal, and does not attach until that of the latter has been determined by the judgment of a Court of competent jurisdiction. During the life-time of the administrator, the surety could not be sued until the status of the account had been fixed by decree of the Probate Court. (*Allen v. Tiffany*, 53 Cal. 16.) But when the liability of the principal thus became fixed, that of the surety also attached, and upon the failure of the principal to pay the money, an action could have been maintained against the surety. In such case the decree of the Probate Court would have been conclusive upon the status of the account, as respects the sureties as well as

the administrator. (*Irwin v. Backus*, 25 id. 222.) Here, the administrator having died without rendering an account, jurisdiction to compel an accounting on the part of his representative, vested in the appropriate Court of Equity (*Bush v. Lindsey*, 44 id. 125); and carrying the doctrine of *Allen v. Tiffany*, *supra*, to its logical conclusion, the adjustment of the account by that Court was pre-requisite to an action against the sureties. If in such action for the settlement of the account of the principal the sureties were entitled to be heard, the appellant in the present case was afforded that opportunity; for he, together with the other sureties on the administrator's bond, was made a party to the bill in equity, and upon his own objection was dismissed therefrom. He now objects that he can not be bound by a judgment rendered in an action to which he was not a party, and that he is entitled to be heard upon the question whether or not his principal was indebted to the estate of which he was administrator. To this we think the maxim *allegans contraria non est audiendus* applies. That maxim expresses, in technical language, the trite saying of Lord Kenyon, that a man shall not be permitted to "blow hot and cold" with reference to the same transaction, or insist, at different times, on the truth of each of two conflicting allegations, according to the promptings of his private interest. (Broom's Legal Maxims, page 130, and authorities there cited.)

The decree of the District Court determined that T. A. Mitchell held in his hands, at the time of his death, eight thousand four hundred and eighty-two dollars and fourteen cents belonging to the estate of Herteman, and accordingly awarded judgment against his administratrix for that sum. There is no provision of the statute, that requires a copy of such a judgment to be filed in the Probate Court, as a pre-requisite to its payment by the administratrix. Indeed, there is no provision of the statute providing for the settlement of the account of an administrator who dies before rendering an account. It is because of the absence of such statutory provision, that the right and duty to compel such accounting belongs to a Court of Equity. (*Bush v. Lindsey*, 44 Cal. 125.) The decree of a Court of Equity in such a case does not come within the provisions of Section 1594 of the Code of

Civil Procedure, nor within the decision in the *Matter of the Estate of Schroeder*, 46 Cal. 304; but so far, at least, as the enforcement of the payment it directs against the estate of the intestate, it is to be regarded in the light of a decree of the Probate Court settling the account and directing payment. The Court of Equity, taking the place of the Probate Court for the purpose of settling the account, takes its place, also, in the matter of directing payment out of the estate, of the amount it finds to be due from it. When it was thus determined that the estate of appellant's principal was indebted to the estate of which he was administrator, for moneys received by him and unexpended, and payment thereof was directed, it became the duty of the administratrix of the estate of the administrator to make the payment, and her failure to do so constituted a breach of the bond sued on, for which the sureties are liable. (*Stovall v. Banks*, 10 Wall. 588.)

The point that the complaint in the present action should have alleged that the decree of the equity Court was never appealed from, is not well taken. The complaint charges that that decree remains unpaid and in full force, which is sufficient. (Freeman on Judgments, Secs. 432-3-4, and authorities there cited.)

Judgment affirmed.

MCKINSTRY and MCKEE, JJ., concurred.

[No. 8,228.—Department One.]

June 27, 1882.

E. A. S. PAGE v. WILLIAM B. LATHAM, JR.

DISMISSAL OF APPEAL.—In this case the appellant having failed to file the transcript within the time prescribed by the rules, notice to dismiss the appeal was served upon him, but pending the appeal leave was given him to file the transcript.

Held: The leave given to file the transcript was not the equivalent of an extension of time under the rules, because such an extension was grantable only for twenty days after the prescribed time; and the liminary time had elapsed long before the transcript was filed. Nor was there an adjudication of the respondent's right to a dismissal by granting leave to file the transcript, for leave was given subject to respondent's pending motion to dismiss.

MOTION to dismiss an appeal from a judgment for plaintiff and from an order denying a new trial in the Superior Court of the City and County of San Francisco. HUNT, Jr., J.

Rhodes & Barstow, for Respondent.

B. S. Brooks, for Appellant.

The COURT:

In the case in hand, time for filing the transcript on appeal, according to Rule 2 of this Court, ended in November, 1881. In December, no transcript being as yet on file, respondent's attorney gave notice that he would move, on January 9, 1882, to dismiss the appeal, for failure to file the transcript within the prescribed time. Hearing of the motion was, by stipulation of appellant's attorney, continued until January 16, 1882, and at that time, on motion of appellant, the hearing was again continued, by order of the Court in bank, until January 30, 1882. On that day the attorney for the appellant appeared and asked leave to file the transcript. Leave being given, the transcript was filed, but the motion to dismiss the appeal remained undisposed of, and the same was transferred to this Department.

We think the respondent is entitled to a dismissal of the appeal, because the transcript was not filed within the time prescribed by Rule 2, nor was it on file at the time the notice of motion to dismiss was given, as provided for by Rule 3; and there had been no extension of the time for filing it applied for or granted. The leave given to file the transcript on the thirtieth of January was not the equivalent of an extension of time under the rules, because such an extension was grantable only for twenty days after the prescribed time; and the limitary time had elapsed long before the transcript was filed. Nor was there an adjudication of the respondent's right to a dismissal by granting leave to file the transcript, for leave was given subject to respondent's pending motion to dismiss. The appeal must, therefore, be dismissed. Ordered accordingly.

[No. 8,294.—Department One.]

June 28, 1882.

ALEXANDER WEIL v. H. K. W. BENT ET AL.

AFFIDAVIT OF SERVICE OF SUMMONS—JUDGMENT BY DEFAULT.—An affidavit of service of summons which fails to state that the affiant was over the age of eighteen years *at the time of the service*, is insufficient to support a judgment by default.

APPEAL by defendant F. Palomares from a judgment for the plaintiff in the Superior Court of Los Angeles County.
HOWARD, J.

The affidavit of service of summons is in the following form:

M. J. Wicks, being duly sworn, deposes and says: I am over the age of eighteen years and not a party to nor interested in this action, etc., etc.

There was an amended complaint in the case with an affidavit of service on defendant Palomares.

F. A. Howard, for Appellant.

Cited *Howard v. Galloway*, *supra*, p. 10.

Glassell & Smith and *M. L. Wicks*, for Respondent.

The judgment in this case, (which is signed by the judge of the Court), recites that the amended complaint was duly personally served on the defendants. The original complaint and summons was served by M. J. Wicks, whose affidavit is similar to that in *Howard v. Galloway*, 8 P. C. L. J. 1060, and *Maynard v. McCrellish*, 57 Cal. 353, both of which cases were decided by Department Two.

As the point of practice is an important one, we beg leave to submit (with the view of leaving the decision of this department unquestioned), that Section 410 C. C. P. does not prescribe the form of the affidavit, but simply provides that the summons may be served by any person over the age of eighteen, not a party to the suit, and that the summons shall be returned with an affidavit of such person of its service.

We submit that the fact of the age of the party serving the process may be made to appear by other evidence than

that of the return, and in this case the judgment being signed and given by the Court, it must be presumed that the Court was satisfied by ocular demonstration or other satisfactory evidence that the party serving the summons was of competent age.

The COURT:

This is an appeal by defendant Palomares from a default judgment. The affidavit of service of summons does not show that affiant was over the age of eighteen years at the time of the service. On authority of *Maynard v. McCrellish*, 57 Cal. 355, and *Howard v. Galloway*, *supra*, p. 10.

Judgment is reversed and cause remanded.

[No. 7,888.—Department Two.]

June 23, 1882.

ELIZA A. COOK, ADMINISTRATRIX ETC. v. CLAY STREET HILL RAILROAD COMPANY.

ACTION FOR DEATH CAUSED BY NEGLIGENCE—SUFFICIENCY OF EVIDENCE—VERDICT.—In an action by the widow and administratrix of a deceased person for damages for the death of the intestate alleged to have been caused by the negligence of the defendant, the jury rendered a verdict for the plaintiff.

Held: The question of evidence was submitted to the jury under instructions as favorable to the defendant as it could ask, and under instructions it did ask for, and as there was evidence from which negligence might be inferred the verdict should not be disturbed.

IN.—ADMISSIBILITY OF EVIDENCE.—1. The plaintiff was allowed to testify that it was the usual custom of deceased, during his married life, to be at home after business hours, and that they had lived a happy married life; that for eight years prior to his death she had been an invalid and unable to leave the house, and that during that time he had been very kind and attentive, and that she was dependent upon him. 2. The daughter of deceased was allowed to testify that he was kind as a father; that the social and domestic relations as to the family on his part were happy, and that he was kind and loving to plaintiff. 3. The plaintiff was permitted to testify that after Mr. Cook had been taken to his home she discovered pieces of flesh.

Held: The first and second points above stated are fully covered by § 377 C. C. P. "Such damages may be given as under all the circumstances of the case may be just"—and by the decision of this Court in *Beeson v.*

Green Mountain G. & S. Co., 57 Cal. 20. As to the third point there is nothing in the case to show that any damages were asked or given for suffering borne by the deceased; the action was for negligently causing his death; and the evidence given was of circumstances attendant upon the injury.

Id.—DAMAGES.—The damages found (eight thousand dollars) were not excessive.

APPEAL from a judgment for the plaintiff, and from an order denying a new trial, in the Superior Court of the City and County of San Francisco. HAYNE, J.

Estee & Boalt, for Appellant.

On the point that all of the above testimony was improperly admitted, we cite the following authorities: *Little Rock and Ft. Smith Ry. Co. v. Barker*, 33 Ark. 350; *Steel v. Kurtz*, 28 Ohio St. 191; *Chicago and B. & Q. R. R. Co. v. Harwood*, 80 Ill. 88; *Potter v. Chicago and N. W. R. R. Co.*, 21 Wis. 373; *Blake v. Midland R. R. Co.*, 10 Eng. L. & Eq. 437; *Field on Damages*, Sec. 627; *Kansas P. Railway Co. v. Cutter*, 19 Kan. 83; *Green v. H. R. Ry. Co.*, 31 Barb. 260; *Donaldson v. M. & M. Ry. Co.*, 18 Ia. 290; *Penn. R. R. Co. v. Butler*, 57 Penn. 337; *Brady v. Chicago*, 4 Biss. 448; *Chicago & N. W. R. R. Co. v. Bayfield*, 37 Mich. 205; *I. C. R. R. v. Baches*, 55 Ill. 379; *Penn. R. R. v. Butler*, 57 Penn. 335; *Sedgwick on Meas. of Dam.* 540; *Regan v. Chicago, etc., R. R. Co.*, 51 Wis. 599; *Mansfield Coal Co. v. McEnery*, 91 Penn. 185; *Penn. Co. v. Roy*, 102 U. S. S. C. Rep. 459.

The Court, against the objections of the defendant, allowed the plaintiff to testify as to what was discovered by her, when Mr. Cook was brought home after the accident, viz: portions of flesh, etc. The only object of this testimony would be to show the suffering of the deceased. (*Whitford v. P. R. R. Co.*, 23 N. Y. 465; *Blake v. Midland R. R. Co.*, 10 Eng. L. and Eq. 443; *Safford v. Drew*, 3 Duer, 633; *Kennedy v. Standard Sugar Refinery*, 125 Mass. 90; *Southern Cotton Press Co. v. Bradley*, 52 Tex. 587; *Lehman v. City of Brooklyn*, 29 Barb. 237; *Chicago & R. Is. R. R. Co. v. Morris*, 26 Ill. 402; *Shear & Red. on Negligence*, Sec. 610; *Penn. R. R. Co. v. Zebe*, 33 Penn. St. 330; *Penn. R. R. Co. v. Goodman*, 62 id. 338; *Penn. R. R. Co. v. Butler*, 57 id. 338.)

H. C. Newhall, Eugene N. Deuprey, and W. W. Cope, for Respondent.

"A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." (C. C., Section 2100.) The doctrine so provided by statute is supported by language, far more forcible in the decisions of the several States and in the text book: "Common carriers of passengers are bound to use more than ordinary care—*i. e.*, more than such care as is used by very cautious persons." (*Edwards v. Lord*, 49 Me. 279; *Maverick v. E. Ave. R. R. Company*, 36 N. Y. 378; *Taylor v. G. T. Ry. Company*, 48 N. H. 304; *Philadelphia & R. R. Co. v. Darby*, 14 How. (U. S.) 486; Thompson's Carrier of Passengers, §§ 200, 201; *Sullivan v. P. & R. R. Co.*, 30 Penn. 234; *Farish v. Reigle*, 11 Grat. (Va.) 697; *New Orleans etc. R. R. Co. v. Allbritton*, 38 Miss. 242; *Stokes v. Saltonstall*, 13 Pet. 181; *Fero v. Buffalo etc. R. R. Co.*, 22 N. Y. 214; *Johnson v. W. & St. P. Co.* 11 Min. 296; *Cohen v. Dry Dock etc. R. R. Co.*, 69 N. Y. 170; *Sales v. W. S. Co.*, 4 Iowa, 547; Redfield on Law of Railways (5th ed.), vol. 2, p. 241, and notes commencing with the words "wilful slayer," etc.; Thompson on Carriers, 239; 1 Starkie on Ev. 423; Story on Bailments (8th ed.), 580; Thompson's Carriers of Passengers, 200, 214; Redfield on Law of Railways (5th ed.), vol. 2, p. 235; 50 Ind. 84, 85; Pierce on Am. R. Law, 494, 495; 4 G. Greene (Iowa), 555; *Jamison v. Santa Clara R. R. Co.*, 55 Cal. 593; *Boyce v. Cal. Stage Co.*, 25 id. 460; *Yeomans v. C. C. N. Co.* 44 id. 72; *Myers v. City and County of San Francisco*, 42 Cal. 215; *Fickin v. Jones*, 28 id. 627.)

In cases of street railways, the same degree of extraordinary caution and care is to be exercised. (Schouler on Bailments, 638; *Maverick v. Eighth Av. R. R. Co.*, 36 N. Y. 378.)

Of the errors in law, designated in the assignment of errors the questions involved, relate solely to the social relations of the deceased, confined to the limit of the family, and to the habits, industrious and economical, of the deceased.

They are all and every within the scope and authority of the doctrine of the case of *Beeson v. Green Mountain G. and S. Co.*, 57 Cal. 20.)

MYRICK, J.:

The defendant is the owner of a street railroad in San Francisco, running on Clay street, between Kearny street and Van Ness avenue. The cars are propelled by means of an endless cable, and to each car is attached a dummy, carrying the gripping apparatus. Seats are arranged on the sides and at the ends of the dummy for the use of passengers. The railroad has two tracks, the northern track being for cars going up the hill from Kearny street and the southern track being for descending cars. On the fourteenth of June, 1880, John H. Cook, plaintiff's husband, seated himself as a passenger at the lower end of the seat on the south side of the dummy. A two-horse express wagon, driven by one Williams, had crossed the northern track, and was standing on the southern track, at a point about one hundred and fifty feet from Kearny street, at the time the dummy in question started; the wagon was so cramped that the horses were headed towards the north track, their heads projecting so far over it that the approaching dummy would have struck them, and the rear end of the wagon pointed obliquely down the hill, also towards the northern track.

As the dummy came up to the wagon, two passengers, seated on the southerly seat, jumped over the back of the seat; as the rear end of the dummy came up, a hind wheel of the wagon collided with the dummy, and Cook received injuries from which he died. This action was brought to recover damages, and the jury returned a verdict for plaintiff for eight thousand dollars. Judgment was rendered accordingly, and from that judgment and from the order denying motion for new trial, defendant appealed.

First—The defendant presents the point that the evidence was insufficient to justify the verdict, and claims that the evidence shows that the collision was the result of carelessness or negligence on the part of the driver of the express wagon, and that the driver of the dummy used due diligence in endeavoring to avoid a collision. There is some conflict in the evidence as to whether the collision was immediately caused by the backing down of the wagon against the dummy, and the defendant insists that as the forward part

of the dummy passed the wagon without collision, the wagon *must have been backing*. There is also a conflict in the evidence as to the distance which would have intervened between the wagon and dummy, if the wagon had remained stationary; one witness says, three or four inches; another, one and a half or two feet, another, two feet, another, three or four feet. The answer of the defendant contains the allegation that "the said horses attached to said wagon were unmanageable and balky, and that the brake on said express wagon was out of repair and unsuited and unfit for the objects and purposes of a brake." The dummy driver testified regarding the horses attached to the express wagon: "My impression was that it was a balky team; I thought it was a balky team; I did not know; there is no dependence to be placed in balky horses; they are liable to scare at anything; I got the impression that it was a balky team as I was drawing up near the wagon, some little time after I started; my mind was still more confirmed that it was a balky team when I got thirty feet than before; I ordered him to turn away his horses; when he turned away his horses I thought I could go by, and I then started at full speed; when the horses commenced to back I stopped; I tried to stop because I knew that if I kept on going, and the wagon kept on coming back, that there would be something terrible happen, some hard crushing of the wagon and car if they would run together." Let it be conceded that the dummy and car could possibly have passed the wagon if the latter had remained stationary, yet, as the wagon and horses were diagonally across the southern track, in the form of two sides of an angle, it being necessary to move the horses in order to pass them, the dummy-driver having observed the position in ample time to stop, as but a narrow space would at best intervene between the wagon and the dummy, as the dummy-driver believed the horses to be balky and perhaps uncontrollable, and as, from the relative positions, the backing of the horses must have forced the wagon against the dummy, it was for the jury to determine whether a proper degree of prudence and caution would not have required the dummy-driver to stop until the horses and wagon could be moved to a safe distance, rather than to go on, as he says, at full speed, and take the risk

of the backing down of the horses. There was a safe course open to the dummy-driver; there was, also, a course open full of risk and peril to the persons and lives of passengers. He took the latter course, in the face of instructions he says he received from the Company, "not to take any desperate chances, or to take any great risks, so far as endangering property or persons was concerned." The question of negligence was submitted to the jury under instructions as favorable to the defendant as it could ask, and under instructions it did ask for, and as there was evidence from which it might infer negligence, we will not disturb the verdict.

Second—The defendant alleges errors of law occurring at the trial and excepted to:

1. The plaintiff was allowed to testify that it was the usual custom of deceased, during his married life, to be at home after business hours, and that they had lived a happy married life; that for eight years prior to his death she had been an invalid and unable to leave the house, and that during that time he had been very kind and attentive, and that she was dependent upon him.

2. The daughter of deceased was allowed to testify that he was kind as a father; that the social and domestic relations as to the family on his part were happy; and that he was kind and loving to plaintiff.

3. The plaintiff was permitted to testify that after Mr. Cook had been taken to his home she discovered pieces of flesh.

The first and second points above stated are fully covered by Section 377, C. C. P.—"Such damages may be given as under all the circumstances of the case may be just"—and by the decision of this Court in *Beeson v. Green Mountain G. & S. Co.*, 57 Cal. 20. We are asked to review that case, and change or modify the views therein expressed. We decline to accede to that request; on the contrary, we here follow them. The plaintiff sued as heir-at-law and as administratrix; in both respects testimony of plaintiff's relations with deceased was admissible; in the latter respect, testimony as to the relations of the father and daughter was admissible. The defendant claims that the admission of the testimony re-

ferred to in the third point, above, was error, in that it would be to show the suffering of the deceased, and damages therefor could not here be recovered. There is nothing in the case to show that any damages were asked or given for suffering borne by the deceased; the action was for negligently causing his death, and the evidence given was of circumstances attendant upon the injury.

Third—The defendant claims that the damages were excessive. The testimony shows that the deceased was fifty-nine years old, the surviving family consisting of his widow and daughter, twenty-three years of age, that he was a game and poultry dealer, and made a good comfortable living for himself and family. The verdict was for eight thousand dollars. That sum of money at the statutory rate of interest, would produce five hundred and sixty dollars a year—some forty-six dollars a month. The plaintiff being an invalid, and having been for years dependent upon her husband, we cannot, as law, say that the amount given is more than, “under all the circumstances of the case,” is just.

Judgment and order affirmed.

We are asked to give damages on affirmance. We cannot say that the appeal was taken for delay; we therefore decline to add damages as a penalty.

THORNTON and SHARPSTEIN, JJ., concurred.

[No. 7,190.—Department Two.]

June 28, 1882.

THOMAS G. McLERAN v. JOHN McNAMARA ET AL.

EJECTMENT—EXECUTION—ADVERSE HOLDERS—PARTIES.—Upon an appeal from an order staying the execution of a writ of possession upon a judgment in ejectment, it appeared, so far as the same related to a tract of land in possession of J. C. and D. C., that the parties named at and before the commencement of the action were in exclusive possession of the land in controversy and that they were made parties to the action; but that the suit as to them was afterwards dismissed.

Held: They were not affected by the judgment, and the order should be affirmed.

APPEAL from an order in favor of defendants Daniel and Jeremiah Callaghan staying a writ of possession in the Superior Court of the City and County of San Francisco.

B. S. Brooks, for Appellant.

The effect of the dismissal of the suit, as to the appellants, was just the same as if no suit had been commenced against them—the same as if the suit had been commenced against Daniel Gorham alone. If the plaintiff had brought suit against Daniel Gorham alone, the recovery of the judgment upon issue joined and verdict of a jury, would have been the establishment of the superiority of the title of the plaintiff to the title of the defendant, and the right of possession as against Gorham followed as a necessary consequence. (*Marshall v. Shafter*, 32 Cal. 176; *Yount v. Howell*, 14 id. 465; *Mahoney v. Middleton*, 41 id. 41; *Satterlee v. Bliss*, 36 id. 489.)

The effect of the deed of quitclaim executed by Moore of his "right, title, and interest," and the entry thereunder by the appellants, made them tenants in common with Daniel Gorham. (*Gates v. Salmon*, 35 Cal. 576; *Gates v. Salmon*, 46 id. 362; *Bornheimer v. Baldwin*, 42 id. 27; *Stark v. Barrett*, 15 id. 361; *Abel v. Love*, 17 id. 233; *Ewald v. Corbett*, 32 id. 493.)

The possession of one tenant in common is the possession of all, unless there is some act of exclusion equivalent to an ouster. (*McCauley v. Harvey*, 49 Cal. 497; *Waring v. Crow*, 11 id. 366; *Colman v. Clements*, 23 id. 245; *Owen v. Morton*, 24 id. 373; *Carpentier v. Mendenhall*, 28 id. 484; *Miller v. Myers*, 46 id. 535; *Aguirre v. Alexander*, 58 id. 21; *Packard v. Johnson*, 57 id. 180.)

Taking actual possession of land under a deed which purports to convey the whole thereof, under a belief that it does convey the whole, when, in fact, it gives title to an undivided portion only, is not an ouster of the tenant in common who owns the other undivided part. *A fortiori*, when the deed, as here, only purports to convey a right, title, and interest. (*Seaton v. Son*, 32 Cal. 481; *Owen v. Morton*, 24 id. 373; *Heberrard v. Jefferson M. Co.*, 33 id. 290; *Carpenter v. Mendenhall*, 28 id. 484.)

It follows that at the time of the commencement of this action Daniel Gorham was in the possession of one undivided fourth of the premises, holding adversely to the plaintiff—that the recovery of judgment established the superior right of the plaintiff to that fourth, and consequently to the possession thereof. That consequently plaintiff is entitled to be put into the possession of the fourth as against Daniel Gorham or any one in privity with him, succeeding to the possession of that fourth since the commencement of this suit.

W. H. L. Barnes, for Respondents.

The evidence contained in the affidavits submitted to the Court upon the motion of the Callaghans, for a perpetual stay of execution as against themselves and their land, tends to show and did establish beyond any question that at the time of the commencement of the action, the Callaghans and their tenants were in the open, notorious and exclusive possession of the so called plaza, and had so been for several years. They continued in possession down to the time when, as at them and their land the action was dismissed, and have thence hitherto continued to hold, occupy and enjoy the same adversely to all the world.

Their possession at the time plaintiff's counsel sought to put the plaintiff in possession of an undivided fourth of the property, had continued for the period of about eighteen years without any attempt at interference with their rights upon the part of anybody.

They were not parties to the action subsequent to the judgment of dismissal in November, 1872, nor when the action was tried, nor when the judgment was rendered. Upon these facts, and it appearing, notwithstanding said judgment of dismissal as to them, that the plaintiff was endeavoring by virtue of a writ of possession, issued December 4, 1877, in pursuance of the judgment against other defendants to take their land, the Court ordered a perpetual stay of the writ as against the Callaghans and their tenants. It cannot need argument to show that this order was properly made. (*McLeran v. McNamara*, 55 Cal. 508.)

MYRICK, J.:

This is an appeal from an order staying all proceedings under a writ of possession issued in this action, so far as the same relates to or affects so much of a tract of land therein described as was in the possession of J. Callaghan and D. Callaghan at the time of the commencement of this action, and was in their possession at the date of said order.

It appears, from the affidavits used on the hearing, that in 1853 Gorham, Moore, Fitzpatrick, and Meiggs took possession of a tract of land containing about twenty-nine acres, and caused the same to be inclosed. They employed one May to occupy the premises and keep possession for them, and for that purpose built a small house on it. May remained in possession until 1858, when he was succeeded by Hollingshead, and he by Ryan, in the same capacity. In April, 1861, J. and D. Callaghan purchased from Moore, taking a deed of the premises involved in this motion (portion of the twenty-nine acres), having no knowledge that any person other than Moore had any interest therein or claim thereto, but being informed by Moore that the land was his, and that Ryan, the person then occupying the house, was his tenant. Ryan attorned to the Callaghans, who have been ever since, by themselves and their tenants, and are, in the quiet and peaceable possession of the premises, holding adversely to all the world. In 1865, the plaintiff, claiming as grantee under Gorham, commenced an action of ejectment against various persons, including the Callaghans and their tenants, to recover possession of a tract of land of about forty acres, including the premises claimed by the Callaghans. In 1872, that action was dismissed as to the Callaghans and their tenants, and judgment of dismissal was entered. The action proceeded as to certain other defendants, exclusive of the Callaghans and their tenants, and in 1874 judgment was rendered in favor of plaintiff and against certain defendants, including Gorham. In 1877, a writ of possession was issued commanding the Sheriff to put plaintiff in possession of the tract of land described in the complaint. One Porter, claiming to be the successor in interest of plaintiff, required the Sheriff to execute the writ by placing him in possession of the undivided

one fourth of the tract of twenty-nine acres. The order of the Court below, staying the execution of the writ as to the Callaghans and their tenants, and the tract in their possession, is the order appealed from.

The order is correct. The Callaghans, by themselves and their tenants, were in the exclusive possession of the land at the time of the commencement of the suit. They were made parties defendant in that suit, which was subsequently dismissed as to them. They, therefore, have not had their day in Court, and they are not affected by the judgment afterwards obtained by plaintiff against other persons.

Order affirmed.

MORRISON, C. J., and THORNTON, J., concurred.

[No. 7,019.—Department Two.]

June 28, 1882.

F. SCHERR v. JOHN T. LITTLE.

CONSTRUCTION OF CONTRACT—ATTACHMENT—REASONABLE TIME.—The defendant in this case, as sheriff, under a writ of attachment, at the suit of the plaintiff, seized \$1,399.11 coin as the property of the judgment debtor which was claimed by one S.; who on the same day brought suit for its recovery. The defendant having demanded indemnity, the plaintiff gave him a bond and also signed a written agreement that the defendant might retain for a reasonable time all moneys that might come into his hands by reason of said attachment or any execution to be issued in said action. After the plaintiff recovered judgment, the Court—pending the suit of S. against the defendant—made an order directing the sheriff, upon the delivery to him of a written undertaking approved by the Court in the sum of \$1,800, to pay into Court, or to his successor in office holding the execution, the money taken under the attachment.

Held: The reasonable time stipulated for in the contract is to be considered with reference to the fact that S. claimed the money, and might endeavor to establish that claim in the Courts. The plaintiff by his agreement has authorized the defendant to rely for his security against the claim of S. not only on the bond but on the money, and he is not entitled to the order while the action of S. is pending.

APPEAL from two orders made after final judgment in the Fifteenth District Court of the City and County of San Francisco. DWINELLE, J.

The first order, dated December 19, 1879, directs the money referred to in the opinion to be paid into Court upon the delivery or tender to the defendant of the undertaking; the last, dated December 22, 1879, recites the execution and approval of the undertaking and directs the payment absolutely.

M. C. Hassett, for Appellant, *M. Nunan*.

Sharon's claim to the money remaining undetermined, the Court could not compel the Sheriff to relinquish to Scherr the whole or any part of the security given against the claim of Sharon; and it had no power to substitute new security in its stead. Any order which the Court might make in the premises would afford no protection to the Sheriff. (C. C. P., §§ 549, 689.)

The stipulation in the bond under which the Sheriff held the moneys collected, as additional security was a contract between the Sheriff and the other parties to the bond, and could not be set aside without the consent of all parties thereto. (C. C., §§ 2848, 2849; *Van Norden v. Durham*, 35 Cal. 136.) It cannot be charged against the Sheriff that he retained the money for an unreasonable time, as additional security since the action of *Sharon v. Nunan* was not decided at the time the orders appealed from were made, although Scherr, by his attorney, C. S. Roe, Esq., prosecuted the defense thereof with "due diligence."

C. S. Roe and *J. M. Rothchild*, for Respondent.

The Court from which this appeal is taken, fully considered the stipulation attached to the bond that appellant could hold the same for a reasonable time, and construed "a reasonable time," to mean sixty days after judgment was recovered by respondent.

The order of December 19, 1879, was made conditional, upon the delivery or tender to him, Nunan, of a written undertaking in the sum of one thousand eight hundred dollars, which shall have been approved by the Judge of that Court.

THE COURT:

A writ of attachment was issued in this action, by virtue of which the Sheriff levied upon and took into his possession one thousand three hundred and ninety-nine dollars and eleven

cents coin, as the property of defendant. The money levied upon was claimed by one Sharon, and the Sheriff notified the plaintiff of the claim and demanded an indemnity bond. The plaintiff gave a bond in the sum of one thousand three hundred dollars. The plaintiff also signed an agreement "that the said Sheriff may retain for a reasonable time, as additional security against the claim of William Sharon, all moneys that may come into his hands by reason of said attachment or any execution to be issued in said action." Afterwards, the plaintiff recovered judgment against defendant for one thousand five hundred and twenty-seven dollars and eighty-two cents and costs, and an execution was issued; the plaintiff demanded that the Sheriff apply the one thousand three hundred and ninety-nine dollars and eleven cents towards the satisfaction of the judgment. Sharon commenced an action against the Sheriff to recover the money levied upon, which action is now pending in this Court on appeal.

In the action now before us, the Court below, on motion, directed the Sheriff to pay into Court and deposit with the Clerk the money levied upon, or pay the same to his successor in office holding the execution; and from that order this appeal was taken.

The question involved is the construction to be given to the agreement signed by the plaintiff to the Sheriff, authorizing him to retain, for a reasonable time, as additional security against the claim of Sharon, all moneys, etc. The words "reasonable time" should have reference to attendant circumstances or events. Reasonable time connected with one set of circumstances, might be quite unreasonable, connected with other circumstances. In this case reasonable time is to be considered with reference to the fact that Sharon claimed the money and might endeavor to establish that claim in the Courts. He has so endeavored, and his action is now pending, and is still undetermined. The sheriff was to have, not only the bond, but as "additional security" against the claim of Sharon, the possession of the money. We think, therefore, that the plaintiff has, by his agreement, authorized the Sheriff to rely for his security not only on the bond, but on the money, and that he is not now entitled to the order.

Order reversed.

[No. 7,779.—In Bank.]
June 28, 1882.

**JOSEPH H. MEREDITH v. THE SANTA CLARA MIN-
ING ASSOCIATION OF BALTIMORE.**

UNDERTAKING ON APPEAL—JUDGMENT AGAINST SURETIES—NOTICE.—Where an undertaking is given under Section 942, C. C. P., to stay the execution of a judgment or order directing the payment of money, and the judgment or order is affirmed, the prevailing party is entitled—if the appellant does not pay the judgment or order within thirty days after the filing of the remittitur—to have judgment against the sureties upon his motion; and of this motion the law requires no notice; for the sureties stipulate in the undertaking that judgment may be so entered.

ID.—ID.—SATISFACTION OF JUDGMENT—PRACTICE.—In such cases, if, in fact, the original judgment was paid, although not satisfied of record, the parties have their remedy, under Section 675, C. C. P., to have satisfaction entered, and for that purpose, to recall any execution which may have been issued against them; or they may have the judgment vacated or annulled.

ID.—ID.—PRESUMPTION IN FAVOR OF JUDGMENT.—In this case, there being nothing in the judgment-roll to the contrary, the intendment is, if necessary, that the Court below found that the appellants had notice.

APPEAL from a judgment from the plaintiff in the Superior Court of the County of Santa Clara. **BELDEN, J.**

Garber, Thornton & Bishop, for Appellants.

The judgment against appellants is void, because rendered without due process of law. The liability of the sureties upon the undertaking depended upon—1. The execution by them of the undertaking; 2. the affirmance of judgment; 3. the filing of the remittitur in the Superior Court thirty days before; 4. the non-payment of the judgment by the appellant; 5. the non-payment of the judgment by the sureties. These were all questions of fact, which the sureties had the right to put in issue, and upon which they were entitled to a hearing and a trial in the due course of legal proceeding, and according to those rules and forms which have been established for the ascertainment of disputed issues of fact. The Legislature has not the power to deprive them of this right, nor even to abridge it. (*Westervelt v Gregg*, 2 Kern. 209; *Taylor v. Porter*, 4 Hill, 146; *Murray's Lessee v. Hoboken Land Co.*, 18 How. (U. S.) 272.)

An issue of this kind cannot be tried upon affidavits. (*Fay v. Cobb*, 52 Cal. 313.)

There is no provision of the law for the entry of judgment upon an undertaking such as the one in question. (C. C. P., § 942. Whatever the cause—whether through inadvertence or otherwise—the Legislature failed to expressly give the Courts jurisdiction to enter judgment upon the class of undertakings of which that at bar is one; and not having expressly conferred such jurisdiction, it is not to be taken by inference, nor presumed to exist. (See *French Bank Case*, 53 Cal. 495.)

The whole section is in derogation of the common law, and is to be strictly construed. It operates (if constitutional) to deprive the citizen of a common law right, and is not to be enlarged by implication.

All that is expressed in the section is, that to stay proceedings the sureties must stipulate that a judgment may be entered against them. But of course this does not confer jurisdiction upon the Courts, to do the thing which the parties stipulated. Parties can only authorize the entry of judgment by virtue of the law; and if there be no law, there can be no judgment.

Craig & Meredith, for Respondent.

This mode of procedure is due process of law. (*Beall v. New Mexico*, 16 Wall. 535; *Davidson v. Farrell*, 8 Minn. 262; *Wright v. Simmons*, 1 Sm. & Marsh. L. (Miss.) 389; *White v. Prigmore*, 29 Ark. 211; *Chappee v. Thomas*, 5 Mich. 59; *Ladd v. Parnell*, 57 Cal. 232; *Wood v. Orford*, 56 id. 157.)

The authorities referred to are full to the point that the constitutional requirements do not impose on Legislatures the duty of providing that previous notices of such motions should be given.

The sureties become actual parties submit to the jurisdiction, and authorize the judgment by the voluntary act of entering into the bond or recognizance. (C. C. P., § 942; *Taylor v. W. P. R. R. Co.*, 45 Cal. 337.)

McKEE, J.:

A money judgment having been originally entered in this case against the corporation defendant, it appealed to the Su-

preme Court, and, for the purpose of staying execution of the judgment, an undertaking on appeal was given, pursuant to Section 942 of the Code of Civil Procedure. The judgment appealed from was afterwards affirmed, and the remittitur, issued upon the affirmance of the judgment, was filed in the lower Court. Thirty days after the filing of the remittitur—it appearing from the record that the judgment had not been satisfied—the Court below, on an order to show cause, rendered judgment against the sureties on the undertaking, pursuant to Section 958, C. C. P., and from this judgment comes the appeal in hand.

It is contended that the judgment rendered against the sureties is void, because the Court had no jurisdiction over their persons; because it was given without due process of law, and without reasonable notice; and because the section of the Code under which it was given is unconstitutional. It is conceded that the lower Court had jurisdiction of the subject-matter of the suit, and of the defendant against whom the original judgment was rendered, and from which that defendant appealed. Now, that appeal was a continuation of the action; by it the original judgment entered in the action was suspended until the appellate Court had determined its validity; and when the sureties to the undertaking on appeal agreed that, in case of the affirmance of the judgment, or of any part of it, by the appellate Court, and of its non-payment by the judgment debtor, judgment might be entered also against them, in the Court from whose judgment the appeal was taken, according to the law under which the appeal was taken, they, in legal effect, voluntarily made themselves parties to the action, and submitted themselves to the jurisdiction of the Court. The Court, therefore, had jurisdiction not only over the person of the original defendant to the action, but also, over the persons of the sureties to the undertaking on appeal in the case, until enforcement of any judgment recoverable against them as parties to the action.

And, having voluntarily made themselves parties to the action and submitted themselves to the jurisdiction of the Court, they also assented to and adopted all the provisions of the law for the enforcement of the obligation incurred by their undertaking, and waived any constitutional or statutory

right in its enforcement to which they might have been otherwise entitled. Such rights may be waived (*Sarver v. Garcia*, 49 Cal. 218; *Cummins v. Scott*, 23 id. 526; *Quivey v. Gamber*, 32 id. 309; *McDonald v. McConkey*, 54 id. 143; *Millard v. Hathaway*, 27 id. 119); and a stipulation by parties to an action that judgment may be entered against them on a certain contingency is a distinct act of waiver. (*Keys v. Warner*, 45 id. 60.) As against such an act, the want of original process necessary to have made them parties originally cannot be invoked.

Nothing is to be found in the Constitution which prohibits any one from making himself a party to an action pending in a Court, or from voluntarily submitting himself to the jurisdiction of the Court, and stipulating that judgment may be entered against him in the action. "A Constitution would become a very officious instrument if it sought to force its protection upon any man against his will." (*Chappee v. Thomas*, 5 Mich. 60.) The section of the Code under which the judgment was entered against the sureties on their appeal bond, does not, therefore, conflict with the Constitution. (*Ladd v. Parnell*, 57 Cal. 232.) "A party," says Mr. Justice Bradley, in *Beall v. New Mexico* (16 Wall. 540), "who enters his name as surety on an appeal bond, does it with a full knowledge of the responsibilities incurred. In view of the law relating to the subject, it is equivalent to a consent that judgment shall be entered up against him if the appellant fails to sustain his appeal. If judgment may thus be entered on a recognizance, and against stipulators in admiralty, we see no reason in the nature of things, or in the provisions of the Constitution, why this effect should not be given to appeal bonds in other actions, if the Legislature deems it expedient. No fundamental constitutional principle is involved; no fact is to be ascertained for the purpose of rendering the sureties liable, which is not apparent in the record itself."

But it is urged that although jurisdiction over the persons of the sureties had been acquired, the Court, in the exercise of that jurisdiction, could not legally render judgment against them, on their undertaking, without notice; because having a right to show payment of the original judgment, they were entitled to notice of any motion for judgment against them

on their undertaking on appeal; and as reasonable notice was not given, the judgment taken against them is irregular and void.

But every presumption is in favor of the legality of the judgment of a Court of competent jurisdiction. Being rendered by a Court of competent jurisdiction, the judgment appealed from is presumably correct. For the purpose of rendering the judgment, no fact was to be ascertained which was not apparent on the record itself. On that record the plaintiff in the action was, as matter of right, entitled, under the law, to have judgment against the sureties upon his motion; and of this motion the law under which it was made required no notice (Sec. 958, C. C. P.); nor was notice necessary; for the sureties had stipulated that judgment might be entered against them upon the contingency which had come to pass, as was apparent from the record of the case in which their stipulation was filed, and a judgment to be entered against parties to an action, pursuant to their stipulation on file, which does not provide for notice, may be entered without notice.

There is not in this mode of procedure anything which prejudices the rights of the parties to the action; for if, in fact, the original judgment was paid, although not satisfied of record, the parties have their remedy under Section 675 of the Code of Civil Procedure to have satisfaction entered, and, for that purpose, to recall any execution which may have been issued against them, or they may have the judgment vacated (*McMillan v. Baker*, 20 Kan. 50); or annulled (*Noyes v. Loeb*, 24 La. Ann. 48.)

Moreover, while, as has been shown, the law does not require notice for the rendition of a judgment against sureties on an appeal bond, upon the expiration of the statutory time after affirmance of the judgment appealed, yet there was given, in fact, a notice in this case. It is said to have been unseasonable and therefore no notice at all; but of that there is nothing in the record; for there is no bill of exceptions, and the judgment on its face shows that "the order to show cause was duly served by delivering copies thereof to the sureties on the undertaking before the return day of the order;" and that "all parties appeared by their respective attorneys."

These recitals in the judgment are sufficient to show service upon the appellants. (*Lick v. Stockdale*, 18 Cal. 223; *Alderson v. Bell*, 9 id. 315; *Peck v. Strauss*, 33 id. 678.) There being nothing in the judgment-roll to the contrary, the intendment is, that the Court below found that the appellants had notice; and as there is no error apparent on the judgment-roll, the judgment is affirmed.

MYRICK, MCKINSTRY, SHARPSTEIN, and THORNTON, JJ., concurred.

[No. 7,965-7,966.—In Bank.]
June 29, 1882.

M. J. O'CONNOR v. B. F. GOOD ET AL. M. J. O'CONNOR v. DANIEL HAZARD ET AL.

STATE PATENT—STATE LANDS—JURISDICTION OF LAND OFFICERS.—Affirmed on the authority of *O'Connor v. Frasher*, 56 Cal. 499.

APPEALS from judgments for the plaintiffs, and from orders denying new trials, in the Superior Court of Los Angeles County. HINES, J.

Will. D. Gould and *James H. Blanchard*, for Appellants.

John D. Bicknell, for Respondents.

The COURT:

The facts, as they appear from the records of these cases, are identical with those in the record of the case of *O'Connor v. Frasher et al.*, 56 Cal. 499, and, upon the authority of that case, the judgments in these cases are affirmed.

MYRICK, J., dissented.

[No. 8,344.—Department One.]
June 29, 1882.

R. S. OSBORNE ET AL v. M. M. CLARK.

STATUTE OF LIMITATIONS—ADVERSE POSSESSION—FINDINGS—PROBATIVE FACTS—PRESUMPTION OF LAW.—In an action of ejectment commenced Sept. 22, 1880, in which the defendant pleaded the Statute of Limita-

tions, as to a portion of the land in controversy, the Court found, upon that issue, in effect, that the defendant purchased from a tenant at sufferance of the plaintiffs, and entered into possession of a house standing upon the land in question, but that he did not claim or hold the land adversely to the plaintiffs until about the first day of March, 1878; and it was objected that the finding did not cover the issue as to the statute. *Held*: From these probative facts the ultimate fact results that the cause of action was not barred by the statute. The finding therefore covered the issue.

APPEAL from a judgment for the plaintiff in the Superior Court of the County of Placer. MYRES, J.

Jo. Hamilton, for Appellant.

The respondent has set up a specific and statutory defense, to wit; That of adverse possession, [C. C. P. §§ 323, 325,] and I submit that he is entitled to a finding of the Court upon the issue. (*Phipps v. Harlan*, 53 Cal. 87; *Baggs v. Smith*, id. 88; *Shaw v. Wandesforde*, id. 300; *Taylor v. Reynolds*, id. 686; *Paulson v. Nunan*, 54 id. 123.)

John M. Fulweiler and J. E. Prewett, for Respondent.

The fourth finding shows, that the grantor of defendant occupied, as tenant at sufferance, the demanded premises, and owned the buildings thereon, and the subsequent facts found as to the possession of defendant, are equivalent to a finding: that his possession of the demanded premises, up until the first of March, 1878, was in subordination to plaintiff's title. If the Court has not, in terms, found the ultimate fact—which we do not admit—it has found the probative facts, from which there can be but one conclusion as to the ultimate fact. The findings are therefore sufficient. (*People v. Hagar*, 52 Cal. 171; *Downing v. Graves*, 55 id. 544; *Johnson v. Perry*, 53 id. 351.)

McKEE, J.:

This is an appeal from the judgment in an action of ejectment.

The only error assigned is, that the finding does not respond to the issue of the Statute of Limitations raised by the pleadings.

The complaint was filed April 22, 1880. In substance, the

Court found that at the commencement of the action, the plaintiff were the owners in fee, and entitled to possession of the demanded premises; that the defendant was then in possession of a building standing upon part of the premises, claiming title to the building and to the land which it covered; that he claimed title to the land under the Statute of Limitations, and to the building by purchase, in 1874, from a "tenant at sufferance" of the plaintiffs; that under this purchase the defendant entered, in 1874, into possession of the building, and occupied it until March, 1878, without making any claim to the land upon which it stood; but on March 1, 1878, he, for the first time, asserted title to the land covered by the building adversely to the plaintiff, and has since continuously held the same adversely to plaintiff and all the world; and, before the commencement of this suit, refused to deliver possession of the land to the plaintiffs on demand.

From these probative facts the ultimate fact that the cause of action was not barred by the Statute of Limitations, necessarily results. The finding, therefore, covered the issue, and, as a special verdict, it was sufficient to support the decision and judgment which were given in the case.

Judgment affirmed.

McKINSTY and ROSS, JJ., concurred.

[No. 8,102.—Department Two.]

June 29, 1882.

BRIDGET REILLY v. LAWRENCE REILLY.

ALIMONY PENDING APPEAL—JURISDICTION—SUPREME COURT.—This Court has no jurisdiction to make an order for alimony pending an appeal.

ID.—ID.—ID.—SUPERIOR COURT.—The power over this matter is vested in the Superior Court, even pending an appeal. The appeal does not take away its jurisdiction, as the matter is not affected by the judgment appealed from.

MOTION in the Supreme Court by the appellant, for temporary alimony and counsel fees pending an appeal from a judgment of divorce in the Superior Court of Alameda County.
CRANE, J.

B. McFadden, for Appellant.

Besides the original writs which this Court may issue, it has power to issue all other writs necessary or proper to the complete exercise of its appellate jurisdiction. (Const. of 1879, Art. vi, § 4; C. C. P., § 51.)

In both Chancery Courts and Courts of Law, in the absence of a statute conferring jurisdiction in terms, or where the statute is silent upon the subject, temporary alimony has been allowed upon the ground that it was an incidental authority to the power given to the Court to decree divorces. (*Melizet v. Melizet*, 1 Parson's Select Cases in Eq., 78; *Petrie v. The People*, 40 Ill. 339; *McGee v. McGee*, 10 Ga. 477; *Mix v. Mix*, 1 Johns. Ch. 110; *Denton v. Denton*, 1 id. 365; *Story v. Story*, Walk. Ch. (Mich.) 421; *Yeo v. Yeo*, 2 Dickens, 498; *Wilson v. Wilson*, 2 Const. Rep. 204; *Wood v. Wood*, 2 Paige, 115; *Galland v. Galland*, 38 Cal. 265.)

In the States of Michigan, Wisconsin, Tennessee, Nevada, and Vermont, motions such as this for alimony *pendente lite* and for counsel fees have been granted by the Supreme Court. (*Goldsmith v. Goldsmith*, 6 Mich. 285; *Helden v. Helden*, 9 Wis. 557; *Krause v. Krause*, 23 id. 354; 41 Vermont, 180; *Lake v. Lake*, 9 Pac. C. L. J. 199; King's Tenn. Digest, 2d ed. Vol. ii, p. 933, Sec. 6, under the caption "Divorce and Alimony.")

Courts will construe liberally constitutional provisions respecting their jurisdiction, and in favor of a right, unless imperatively required by the language of the Constitution to give them a different construction. (*Perry v. Ames*, 26 Cal. 372; *Conant v. Conant*, 10 id. 249; *Courtwright v. Bear R. & A. W. Co.*, 30 id. 573; *Cariaga v. Dryden*, 30 id. 246; *Appeal of S. O. Houghton*, 42 id. 35; *Hill v. Finnigan*, 54 id. 493.)

R. A. Redman, for Respondent.

The cases cited by counsel, 6 Mich. 285; 9 Wis. Rep. 557, and 23 Wis. Rep. 354, though apparently in point, afford no assistance in the determination of the question in this Court. The Constitutions of those States as they stood at the dates of those decisions show that there is a marked difference be-

tween their provisions and ours. In both of those States they may grant "original and remedial" writs, etc. Section 4 of Article vi. defines the jurisdiction of this Court, and the powers necessary to be exercised in granting appellant's motion, we claim to be exercising original jurisdiction (not in aid of its appellate jurisdiction, for it is in full possession of the case on appeal), and not only would it be exercising original jurisdiction, but usurping the identical powers conferred upon the Superior Courts by Section 5 of the same Article.

Construing these two sections together it would seem that the expression of the one in Section 5, and the failure to adopt such language as is used in the Constitutions of Wisconsin, Michigan, and many of the other new States, would warrant the construction that the exercise of original jurisdiction in matters of this kind was limited to the lower Court.

THORNTON, J. :

This is a motion made in this Court for alimony pending an appeal. We do not think any such jurisdiction is vested in this Court. Only appellate jurisdiction is conferred on this tribunal by the organic law defining its jurisdiction, and the jurisdiction invoked here is, in our view, original. It is true that power is also vested in this Court to issue all writs necessary or proper to the complete exercise of its appellate jurisdiction. But no writ is necessary or proper here. The appellate jurisdiction can be exercised without it. The power over this matter is vested in the Superior Court, even pending an appeal. The appeal does not take away its jurisdiction, as the matter is not affected by the judgment appealed from. (C. C. P., 946.) The cause is still pending in the Superior Court for the purpose sought to be attained by this motion.

The motion is denied.

MYRICK and SHARPSTEIN, JJ., concurred.

[No. 8,296.—Department Two.]

June 29, 1882.

W. W. WHITNEY v. DENNIS MCCOY ET AL.

ATTACHMENT—SUBSEQUENT MORTGAGE FOR OWELTY OF PARTITION.—The interest of M., an undivided half, in a tract of land owned by him as tenant in common with S., was attached by A. Subsequently by a judgment of partition a specific portion of the tract was allotted to M.—she however, being required by the judgment—in order to equalize the partition, to execute a mortgage to S. upon her allotment for one hundred and eighty-five dollars. Afterwards the interest of M. in the tract allotted to her was sold under execution in the attachment suit, and A. became the purchaser and received his deed, and having been made party to a suit to foreclose the mortgage of S. claimed that his title was paramount to the mortgage.

Held: The plaintiff was entitled to have foreclosure of his mortgage upon whatever interest M. held in the premises in excess of the undivided one half held by her at the time of the levy of A.'s attachment.

APPEAL by the plaintiff from a judgment for defendant Ancker in the Superior Court of San Bernardino County.
ROLFE, J.:

H. M. Willis and *H. Goodcell, Jr.*, for Appellant.

The extent of the interest that would be acquired by the purchaser at the foreclosure sale, was not a matter to be determined in this action, but might be the subject of a subsequent action between such purchaser and said Ancker. (*San Francisco v. Lawton*, 18 Cal. 475-478; *Cook v. De la Guerra*, 24 id. 240; *Elias v. Verdugo*, 27 id. 425.)

Waters & Gibson, for Respondent.

A purchaser acquires all the interest of a defendant on execution sale, that inured to the defendant between the time of seizure of property under an attachment and sale of same on execution. (*Freeman on Ex.*, Sec. 335; *Kenyon v. Quinn*, 41 Cal. 325.) The law neither does nor requires idle acts, nor so exercises its powers as to encourage litigation, which would be the case if the Court had made a decree of foreclosure under the authorities cited in appellant's brief.

1. The plaintiff set forth the defendant Ancker's title in his complaint, seeking a determination of it in connection with his action to foreclose, and then stipulated that both ac-

tions be tried, thereby estopping himself from insisting, for the first time in this Court, that defendant Ancker must ascertain his interest, or title, in a separate action. (*Hibernia S. & L. S. v. Ordway*, 38 Cal. 681.)

2. The defendant Ancker's title commenced from the time of the attachment levy, as against all persons not parties to the writ, and, therefore, was prior in time and superior to the mortgage lien, if the latter ever attached. (*Blood v. Light*, 38 Cal. 656-7; *Johnson v. Gorham*, 6 id. 196.)

The COURT:

The plaintiff was entitled to have foreclosure of his mortgage upon whatever interest the defendant, Annie S. McCoy, held in the premises in excess of the undivided one half held by her at the time of the levy of the attachment of the defendant, Ancker. The finding of the Court below is clear that there was such excess to the extent of one hundred and eighty-five dollars.

Judgment reversed.

[No. 7,952.—Department Two.]

June 29, 1882.

JOHN N. CROWLEY v. THE CITY RAILROAD COMPANY.

PLEADING—DENIAL OF EXECUTION OF WRITTEN INSTRUMENT—RELEASE—ISSUES—EVIDENCE—PRACTICE.—In an action for damages for the death of the plaintiff's minor son—alleged to have been killed by the negligence of defendant—the defendant pleaded in bar a release in writing by the plaintiff of all demand for the damages sued for, and in his answer inserted a copy of the release. The execution of the release was not denied by the plaintiff, in the mode required by Section 448, C. C. P., but the evidence was offered by the plaintiff, and admitted without objection, tending to show that at the time he signed the release he was incompetent to contract. The verdict was for the plaintiff.

Held: Under such circumstances, the defendant can not be allowed to raise the point in this Court, that the verdict of the jury is against an admission made by the pleadings.

ACTION BY FATHER FOR DEATH OF SON—NEGLIGENCE—RELEASE—COMPETENCY TO CONTRACT—SUFFICIENCY OF EVIDENCE—INSTRUCTIONS.—The evidence held sufficient to justify the verdict, and the instructions of the Court below with regard to negligence and the mental competency of the plaintiff to execute the release, approved.

APPEAL from a judgment for the plaintiff and an order denying a new trial in the Superior Court, of the City and County of San Francisco. SULLIVAN, J.

The instructions referred to by the Court appear in the argument of appellant's attorneys.

Russell J. Wilson and E. J. & J. H. Moore, Wilson & Wilson, for Appellant.

If the Court or jury find a fact contrary to the admissions of record, the same must be disregarded. (*Bradbury v. Cronise*, 46 Cal. 288; *Gregory v. Nelson*, 41 id. 288; *Burnett v. Stearns*, 33 id. 473; *Morenhout v. Barron*, 42 id. 591; *Tevie v. Hicks*, 41 id. 127.)

The Court erred in giving the following instructions to the jury: "But even though you should find that the deceased, either through his own or his parents' negligence was upon the defendant's track, and that he there negligently and carelessly exposed himself to be run over by its car, still if you should believe that the child did not know of the approach of the car in time to have avoided the accident, and you should also believe that the driver in charge of the car, if exercising ordinary care, could have seen the boy in time to prevent the accident, and could have stopped the car in time to avoid the accident, then the defendant would be liable, notwithstanding the negligence of deceased or his parents." (*Needham v. S. F. & S. J. R. R. Co.*, 37 Cal. 409.)

The Court erred in giving the following instruction to the jury: "Where a party when he enters into a contract is in such a state of drunkenness as not to know what he is doing, his contract is void."

J. D. Sullivan and James C. Cary, for Respondent.

The instructions were correct. (*Needham v. S. F. R. R. Co.*, 37 Cal. 409; *Schierhold v. N. B. & M. R. R. Co.*, 40 id. 454.)

THORNTON, J.:

This is an action by a father to recover damages for the death of his son, alleged to have been caused by the negligence of the defendant. The defendant *inter alia* pleaded in bar

a release by plaintiff of all demand for the damages sued for, and in his answer inserts a copy of the release. This was not denied by plaintiff in the mode required by Section 448 of the Code of Civil Procedure. The plaintiff offered evidence tending to show that at the time he signed the release, he was incompetent to contract. To this evidence there was no objection by defendant, and the case was tried as if the fact of execution had been denied, issue on such point properly raised, and a verdict was found for plaintiff.

It is now said that this was error because there was no issue as to the execution of the release in the case; that by failing to make the affidavit required by the section of the Code of Civil Procedure above cited, its execution was admitted.

But, as stated above, when the evidence to show that the instrument of release was not executed was offered, no objection was made to it, and the trial proceeded throughout as if there was such an issue on which the jury was to pass. Under such circumstances the defendant can not be allowed to raise the point in this Court, that the verdict of the jury is against an admission made by the pleadings. This view is sustained by *Tynan v. Walker*, 35 Cal. 645, and *Cave v. Crafts*, 53 id. 141. We can not hold this contention of defendant tenable.

The evidence was sufficient to sustain the verdict. There was some conflict in the evidence, but on every essential point there was evidence before the jury sufficient to justify the conclusion to which they came. The cause should not then be sent back for a new trial on the ground that the evidence was insufficient to justify the verdict.

We have examined the instructions of the Court attacked by the defendant, and find no error in the action of the Court in regard to them.

The judgment and order of the Court are without error and are affirmed.

MYRICK and SHARPSTEIN, JJ., concurred.

[No. 7,186.—Department Two.]
June 29, 1882.

**THE ORIGINAL COMPANY OF THE WILLIAMS &
KELLINGER ETC. v. THE WINTHROP MINING
COMPANY.**

MINING LAW—LOCAL REGULATIONS—CUSTOMS—INSTRUCTIONS.—In an action of ejectment for a mining claim, the Court instructed the jury, that the location of a mining claim must not only observe the law of Congress (Act of May 10, 1872, Statutes at Large), which requires that "ten dollars' worth of labor shall be performed or improvements made each year for each one hundred feet in length along the vein," but also the local regulations of the miners of the district, which require "that work shall be done every sixty days on the claim."

Held: The Court erred; there is a clear conflict between the law and the regulations, and the law must prevail.

APPEAL from an order denying plaintiff's motion for a new trial, in the Superior Court of the City and County of San Francisco. **CAREY, J.**

Pratt & Metcalfe, for Appellant.

By the Act of May 10, 1872, and the Acts of March 1, 1873, and June 6, 1874, amendatory thereof, which may be termed Acts of relief for those who had located mining claims prior to the passage of the Act of May 10, 1872, Congress had provided, that the amount of work to be performed and the time in which such work shall be performed is extended to January 1, 1875. (Sickles Min. L. & Dec. 24, 32.)

The Court below held, that there is no conflict between these Acts of Congress and the local rules and regulations then in force in the district where the mine is located. But their provisions plainly appear to us irreconcilable. That the Acts of Congress are the paramount law, is too plain for argument. Under the Acts of Congress above cited, appellants had until the first day of January, 1875, in which to make the first annual expenditure. (*Belk v. Meagher et al.*, 3 Morrison's Trans. 243; *Du Prat v. James et al.*, 9 P. C. L. J. 56.)

George F. & W. H. Sharp and *George Turner*, for Respondent.

Under the Act of Congress of May 10, 1872, a compliance with the local laws and rules of the mining district are re-

quired. Under this provision, the local law can not contradict, but may add to the Act of Congress, in all matters not inconsistent with the Act. (Skidmore's Mining Statutes, 59; Weeks on Mineral Lands, 189.)

SHARPSTEIN, J.:

We think that the Court erred in charging the jury that a locator of a mining claim must not only observe the law of Congress which requires that "ten dollars' worth of labor shall be performed or improvements made each year for each one hundred feet in length along the vein, until a patent shall have been issued therefor," but also the local regulations of the miners of the district, which require "that work shall be done every sixty days on the claim."

According to the law of Congress, a locator would forfeit his claim if he did not each year perform work or make improvements of the value of ten dollars for each hundred feet of the vein. But by the local regulations, he would forfeit it if he did not perform some work on it every sixty days. It seems to us that there is a clear conflict between the law and the regulations. And if there is, it is conceded that the law must prevail.

Order denying motion for new trial reversed.

MYRICK, J., MORRISON, C. J., and THORNTON, J., concurred.

[No. 7,188.—Department Two.]

June 29, 1882.

JOHN H. REDINGTON ET AL. *v.* MATTHEW NUNAN.

REPLEVIN—SALE OF PERSONAL PROPERTY—FRAUD AS TO CREDITORS—CHANGE OF POSSESSION.—In an action to recover the possession of personal property—in which the defendant justified as Sheriff, under an attachment against one C., alleged in the answer to be owner—it appeared from the evidence that the property (consisting of the stock of a drug store) was purchased by the plaintiffs' vendor from the assignee in bankruptcy of C., and that C., who was then in possession, was allowed to remain in possession pending negotiations for a purchase by him; that subsequently the plaintiffs made a written agreement to sell the property to C. upon certain terms, and that, upon the failure of C. to comply with the terms

of the contract, the plaintiffs took possession some time prior to the levy of the attachment. The findings and judgment were for the plaintiffs.

Held: At the time of the transfer it was the assignee who was in possession and had control of the property, and there is no evidence which tends to prove that he did not immediately deliver it to the purchaser, or that the sale was not followed by an actual and continued change of possession. Therefore the transfer can not be conclusively presumed to be fraudulent as against the creditors of the bankrupt.

ID.—ID.—ID.—SUFFICIENCY OF EVIDENCE—FINDING.—Whether the property at the time of the seizure of it was the property of the plaintiff, is a question for the Court, sitting in place of a jury, to determine; the evidence being conflicting, the finding upon that point can not be disturbed.

ID.—DAMAGES—CONVERSION.—The action being for the recovery of possession of personal property, and not for its conversion, it was error for the Court to include in the judgment the money expended by the plaintiff in the pursuit of the property.

APPEAL from a judgment for the plaintiffs in the Twelfth District Court of the City and County of San Francisco—**DAINGERFIELD, J.**—and from an order denying a new trial in the Superior Court of the same City and County by the same Judge.

The complaint was as follows:

“The plaintiffs above named complain of Mathew Nunan, the defendant, and for cause of action allege: That at, and during all of the times hereinafter mentioned, said plaintiffs were and now are, copartners in trade doing business in the City and County of San Francisco, under the firm name of Redington & Co.

“That heretofore, to wit: On the ninth day of August, A. D. 1877, at the City and County of San Francisco, said plaintiffs were the owners of, all and singular, the goods, wares, merchandise, fixtures and personal property then in the Marine Drug Store, situated at the easterly corner of Market and Steuart streets, in said city and county, and particularly enumerated and set forth in the schedule attached hereto and marked ‘Exhibit A,’ and made a part of this complaint, of the value of four thousand dollars.

“That said defendant, on the ninth day of August, A. D. 1877, at said city and county, without plaintiffs’ consent, and wrongfully took said goods, wares, merchandise, fixtures, and personal property from the possession of plaintiffs.

"That before the commencement of this action, to wit: On the tenth day of August, A. D. 1877, plaintiffs demanded of the defendant possession of said goods, wares, merchandise, fixtures, and personal property.

"And plaintiffs further aver, that, in pursuit of the said property, plaintiffs have been compelled to expend much time and money; that they employed counsel immediately upon the taking of said property by defendant, and have advised with said counsel from said taking until the present time; that they also employed said counsel in the bringing and prosecution of this suit; and that they have paid to their said counsel for their services in that behalf the sum of two hundred and fifty dollars in United States gold coin, which was a reasonable compensation therefor.

"That a fair compensation for the time and money properly expended by plaintiffs in the pursuit of said property is the sum of one thousand dollars.

"That said defendant still unlawfully withholds and detains said goods, wares, merchandise, fixtures, and personal property from the possession of plaintiff, to their damage in the sum of one thousand dollars.

"Wherefore, plaintiffs demand judgment against the defendant.

"1. For the recovery of the possession of said goods and chattels, or for the sum of four thousand dollars, the value thereof, in case a delivery can not be had.

"2. For one thousand dollars, damages, and for costs of suit.

"COWLES & DROWN,

"Attorneys for Plaintiffs."

The defendant justified as Sheriff under an attachment against one Curtis, whose property the answer alleged the property in question to be. The plaintiff derived title from the assignee of Curtis in bankruptcy. Curtis remained in possession after the purchase as agent of the plaintiffs until January 25, 1871; at which time the parties entered into a contract, the material parts of which are as follows: Memorandum of agreement * * * this twenty-fifth day of January, A. D. 1877, between the firm doing business at said city and county under the name and style of Redington &

Co., party of the first part, and James Curtis, of said city and county and State, party of the second part.

* * * * *
Whereas, said party of the second part desires to purchase, from said party of the first part, the said fixtures, furniture, stock in trade, appliances, appurtenances, goods, wares and merchandise, and personal property, upon the terms and conditions hereinafter set forth.

Now, this agreement witnesseth, that the said party of the first part, in consideration of the covenants, undertakings and agreements hereinafter contained, on the part of said party of the second part to be kept and performed, has agreed, and does by these presents agree, to and with said party of the second part, to sell, assign, transfer and convey to said party of the second part, all * * * (The property in question.)

That the said party of the second part may, upon the execution hereof, enter into the occupancy of said drug store and take possession of the property aforesaid; and thereafter and until default made hereunder and the surrender to or the recovery by said party of the first part of the possession, use, and occupancy of said store and property, may hold and use the same, and have and take to himself the income and profit of the business of said store.

That until the full and complete performance by said party of the second part of the conditions herein contained, on his part to be performed and kept; said property is not, neither is any part thereof, to be removed from said premises or transferred to any other place; * * * the said party of the first part shall also have the right and privilege at any time, or for all the time prior to the full performance of this agreement by said party of the second part, to be represented at said store and in the business thereof by a clerk, who shall be made conversant with the management of said property and the conduct of said business, and whose wages or salary shall be borne and paid by said party of the second part.

That said party of the second part shall, from and after the execution hereof, pay the monthly rental of the premises occupied by said store; * * * that until the complete performance by said party of the second part of this agree-

ment, said party of the first part and its duly authorized agents, attorneys, and servants shall at any and all times have access to, and the right to inspect any books, accounts, papers, or vouchers pertaining to said property, or to said store, or the business thereof.

That said party of the second part will pay to said party of the first part for said property the sum of nine thousand six hundred and ninety-three dollars and twenty-one cents in gold coin of the United States, in manner following:

(Here follows the terms of payment:)

That said party of the second part will also pay to said party of the first part, on the first day of each and every month during the running of this agreement, all sums due from him for purchases made from said party of the first part during the antecedent month.

That when said sum of nine thousand six hundred and ninety-three dollars and twenty-one cents in gold coin, with the interest thereon as above provided, shall be fully paid, and all the covenants, conditions, and agreements hereof shall have been fully performed by said party of the second part, said party of the first part will execute, to said party of the second part, a bill of sale of said drug store and of the said property hereby agreed to be sold, and deliver and transfer to said party of the second part the absolute possession, control and ownership of the same.

That until the full payment of the said sum, with the said interest thereon, and the execution of said bill of sale, and the complete performance, by said party of the second part, of the covenants and agreements aforesaid, the said drug store and all and singular the property aforesaid shall be and continue, solely and entirely, the property of said party of the first part. * * * And the said party of the second part, in consideration of the premises, hereby agrees to purchase said property so agreed to be sold by said party of the first part as aforesaid, and to pay therefor the said sum of nine thousand six hundred and ninety-three dollars and twenty-one cents, in gold coin, in the manner and with the interest hereinbefore specified. * * * It is mutually agreed, that time is of the essence of this agreement. * * *

H. J. Tilden, for Appellant.

The Court erred in allowing three hundred dollars for expenses in pursuing the property; there is no evidence of any money having been expended in pursuit of the property, and if there had been, it could not be recovered in a replevin suit. (*Kelly v. McKibben*, 54 Cal. 192; Civil Code, Section 3336.)

The indebtedness of Curtis to Ballard was created in January and September, 1876, and the plaintiff's testimony shows, without any conflict, that Curtis continued to carry on the store in his own name, buying goods of Redington & Co. and other persons, and selling them to the public—in fact, that he dealt with the property as his own right, along after the bankruptcy proceedings in 1875 the same as before, up to the agreement of January 25, 1877, and thereafter until June or July, 1877, and even after that and until the attachment. From which it seems to me the claim of ownership of Redington & Co. must be conclusively presumed to be fraudulent and void as against the creditors of Curtis while he remained in possession. (Civil Code, Section 3440; *Watson v. Rodgers*, 53 Cal. 401; *Woods v. Bugbey*, 29 id. 466; *Hesthal v. Myles*, 53 id. 624; *Edwards v. Sonoma Valley Bank*, 8 P. C. L. J. 705.)

The Judge who tried the case below seemed to think because the property was purchased at the assignees' sale, the rule above does not apply, but the Civil Code makes no exception, and I can find no decisions where it has been held, that if a purchaser at such sale, or a sale on execution, leaves the property in possession of the debtor and allows him to deal with it as his own, the same as before (as shown by the facts in this case), the presumption of fraud does not apply as to the vendors or creditors of such debtor, but on the contrary, the decisions are that the presumption of fraud does apply. (*Betz v. Conner*, 7 Daly, 550; *Fonda v. Gross*, 15 Wend. 628; *Gardenier v. Tubbs*, 21 id. 169; 4 Wait's Practice, 74; *Stimson v. Wrigley*, 86 N. Y. 336.)

The authorities, I believe, are uniform, that when it is agreed that a party shall take possession of property, such as merchandise, in a store, and buy and sell the goods in the ordinary manner, that the transaction will be decreed to be

fraudulent and void as to the creditors and purchasers. (*Edgell v. Hart*, 9 N. Y. 213; *Hostler v. Hays*, 3 Cal. 303; Wells on Replevin, Sec. 329; *Devlin v. O'Neill*, 6 Daly, 305.)

A. N. Drown, for Respondents.

Whatever in the prayer relates to a return of the property was made surplusage by the answer, or will be regarded as surplusage, for the purpose of upholding the judgment. (Code Civ. Pro. § 580; Pomeroy's Rem. & Rem. Rights. § 580: *Emery v. Pease*, 20 N. Y. 64; *Rollins v. Forbes*, 10 Cal. 299; *Stringer v. Davis*, 35 id. 29; Bliss on Code Pleading, §§ 161, 167, 437.) Such being the case, we are clearly within the purview of Section 3336 of the Civil Code as amended January 22, 1878. (*Tulley v. Tranor*, 53 Cal. 274; *Dent v. Holbrook*, 54 id. 145.) It is not pretended that Curtis had paid for this property, or had at any time after January 25, 1877, anything more than a conditional right of purchase. Redington & Co. expressly provided that until the full payment of the purchase money and the execution of the bill of sale and the complete performance * * * of the covenants and agreements aforesaid, the said drug-store, and all and singular the property aforesaid, shall be and continue solely and entirely the property of said party of the first part. (*Buckmaster v. Smith*, 22 Vt. 203; *Woodbury v. Long*, 8 Pick. 542; S. C., 19 Am. Dec. 345; *McFarland v. Farmer*, 42 N. H. 389; Drake on Attachment (5th ed.), § 246; *Putnam v. Lamphier*, 36 Cal. 151; *Kohler v. Hayes*, 41 id. 455; *Truman v. Hardin*, 5 Saw. C. C. 117, 118.)

Indeed, the transaction did not even amount to a conditional sale. There are no present words of sale or transfer in the paper; it is merely an executory contract, a conditional agreement to sell, enforceable by Curtis only upon strict compliance with the conditions as to time, payments, etc. (*Sumner v. McFarlan*, 15 Kan. 600; *Enlow v. Klein*, 79 Pa. St. 490.) The assignment related back to the commencement of the proceedings, and by operation of law, vested the title to all property, real and personal, in the assignee. (U. S. Rev. Stat. 5044; Bump's Bankruptcy, 10 ed. 485.) The assignee succeeds to the rights of all the creditors, as well as of the bankrupt. (Bump on Bank. 503.) For these reasons, if for no others.

the statute of frauds could have no application to the transfer to the assignee. Moreover, transfers are of two kinds: (1) an act of the parties, (2) or of the law (Civ. Code, § 1039). The transfer contemplated by Section 3440 is of the first kind; the transfer by reason of the bankruptcy is of the second. (*Mays v. Manuf. Nat. Bank*, 64 Penn. St. 77; *In re Lake*, 3 Biss. 204; S. C., 6 Bank Reg. 543; *In re Gregg*, 3 Bank Reg. 535, 536.)

The COURT :

The transfer of the property sued for in this action, if made at all, was made by the assignee of the estate of Curtis in bankruptcy, and not by Curtis, so that at the time of the transfer it was the assignee who was in possession and had control of said property, and there is no evidence which tends to prove that he did not immediately deliver it to the purchaser, or that said sale was not followed by an actual and continued change of possession. Therefore, the transfer can not be conclusively presumed to be fraudulent, as against creditors of the bankrupt. Whether the property, at the time of the seizure of it by the defendant, was the property of the plaintiff, was a question for the jury, or for the Court sitting in place of the jury, to determine; and as we think that the evidence is conflicting, we can not disturb the finding upon that point. It was an inference of fact, and not a presumption of law, that had to be drawn from the evidence.

But we think that the Court erred in including in the judgment the sum of three hundred dollars for money expended by the plaintiff in the pursuit of said property. The action is for the recovery of the possession of personal property, and not for the conversion of it. This distinction was pointed out in *Kelly v. McKibben*, 54 Cal. 192.

The judgment must, therefore, be modified by deducting from it said sum of three hundred dollars, and with that modification it is affirmed.

[No. 10,713.—In Bank.]

June 29, 1882.

THE PEOPLE v. JOSEPH CADD.

ATTEMPT TO COMMIT ROBBERY—INSTRUCTIONS—EVIDENCE.—Information for an attempt to commit robbery. The Court instructed the jury as stated in the opinion, and refused to grant an instruction asked by the defendant.

Held: The charge of the Court was correct and embodied the instruction refused.

APPEAL from a judgment of conviction, and from an order denying a new trial in the Superior Court of San Bernardino County. ROLFE, J.

The following is the instruction asked by defendant and refused by the Court: "The Court on the part of defendant instructs the jury as follows: That the character of a party's motives even when they are unquestionably of a criminal nature, may nevertheless be susceptible of different interpretations and indicative of very different degrees of moral and legal guilt.

"In all cases every sound principle of interpretation and judgment requires that the act shall be referred to the operation of the least guilty motive which can be reasonably deduced from the evidence.

"Refused, because so far as applicable, included in the charge of the Court. ROLFE, Judge."

Satterwhite & Curtis, for Appellant.

A. L. Hart, Attorney General, for Respondent.

The COURT:

In the charge of the Court below is embodied, in substance, such portions of the instructions asked by the defendant, and refused by the Court, as were pertinent and proper.

The charge is as follows:

"The jury are the judges of the effect or value of evidence addressed to them. Their power, however, of judging of the effect of evidence is not arbitrary, but should be exercised

with legal discretion and in subordination of the rules of evidence.

"You are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in your minds against a less number, or against a presumption or other evidence satisfying your minds.

"The defendant is accused of making an assault with intent to rob one Harrison Bemis. The accused is presumed to be innocent until the contrary is established. In every crime or public offense there must exist a union or joint operation of act and intent, or criminal negligence. As to this intent, you must derive it from his acts and conduct, and the circumstances in the case. No man can look into the mind of another and read it like a book. But there are certain presumptions of law regarding a man's intent, by which you should be governed. These are, that an unlawful act was done with an unlawful intent. Also, that a person intends the ordinary consequences of his voluntary act. These presumptions are by law satisfactory, if uncontradicted, but may be contradicted by other evidence. The effect of these rules is, that when the doing of an act, which, if coupled with a guilty intent, would be a violation of law, is proven, the burden of showing that the act was done without a guilty intent, is usually thrown upon the accused.

"In this case, if it be proven that the accused made an assault upon Bemis, at the same time demanding his money, the presumption is that he intended to rob Bemis or get his money by means of force or fear—and upon this presumption you should act, unless such intent is contradicted by other evidence or circumstances attending the case.

"The defendant is entitled to the benefit of all reasonable doubt arising from the evidence, as well in respect to any essential fact or matter necessary to constitute guilt, as to whether he is guilty at all.

"It is your duty as reasonable men to carefully weigh and compare all the evidence and circumstances with the view of not convicting the accused on a mere probability of guilt, however plausible; unless the evidence, observing also the presumptions of law, entirely satisfies you of his guilt.

"If, however, you are so satisfied of his guilt, your plain
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duty is to convict. In this matter you should be guided by reasonable common sense. You are not to seek for doubts by any strained construction or interpretation of evidence or facts.

"A reasonable doubt is not a mere possible doubt. For everything depending on human testimony is liable to some conceivable doubt.

"A reasonable doubt is that state of the case which, after the entire comparisons and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge; that is to a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it."

To this charge several objections are taken; but we think they amount to no more than verbal criticism. The Court stated the law to the jury clearly and correctly.

Judgment and order affirmed.

[No. 8,295—Department Two.]

June 29, 1882.

JOHN R. SCRANTON v. W. A. BEGOL

MONEY HAD AND RECEIVED—ACTION FOR MORTGAGE.—The plaintiff being the equitable owner of certain land caused the same to be conveyed to the defendant as security against loss on account of a promissory note executed by the defendant, with, and as surety for, the plaintiff, and which was afterwards paid by the plaintiff. The defendant sold the property to innocent purchasers and received the purchase money.

Held: The plaintiff was entitled to recover the amount received after deducting expenses.

APPEAL from a judgment for the plaintiff in the Superior Court of the County of San Diego. McNEALY, J.

The complaint in effect alleged and the Court found "That on the thirty-first day of March, 1877, the plaintiff borrowed of the Commercial Bank of San Diego, a corporation duly organized and acting under the laws of the State of California, the sum of three hundred dollars, and, jointly with the

defendant, executed a promissory note therefor to said corporation. That the defendant executed said note solely and only as security for said plaintiff. That at the time of the execution of said note the plaintiff was the owner of all the real estate described in his complaint, but that the title thereto stood of record in the Recorder's office of this county, in the name of C. R. McClellan and John Fisher, and that, for the sole and only purpose of securing the defendant against all loss or damage on account of having signed said note as surety for plaintiff, the said C. R. McClellan and John Fisher, solely at the request of plaintiff, conveyed all of said real property to the said defendant. That said conveyance was made by a deed absolute in form, and purporting on its face to grant a fee-simple title to defendant, but was only intended by the plaintiff and defendant, as a mortgage of said real property by plaintiff to defendant to secure him as aforesaid, and his becoming surety on said note was the only consideration therefor. * * * That defendant paid the interest on, and principal of, said note." That the plaintiff had sold the property to innocent purchasers for seven hundred and ninety-one dollars, etc.

The appeal was on the judgment roll and there was no bill of exceptions or statement.

M. A. Luce, for Appellant.

There seems to be three distinct and sufficient reasons why the transaction disclosed in this case cannot be denominated a mortgage.

1. Under our Code—C. C. § 2923—"A mortgage can be created, renewed or extended only by writing, executed with the formalities required in the case of a grant of real property." (*Porter v. Muller*, 53 Cal. 677.) To constitute a mortgage the transaction must be between the parties to the deed. (*Flagg v. Mann*, 14 Pick., 480; *Treat v. Strickland*, 23 Me. 234; *Warren v. Lovis*, 53 id. 463; *Low v. Henry*, 9 Cal. 538; *Payne v. Patterson*, 77 Pa. St. 134.)

It seems to be the rule that without a defeasance, either written or in parole, that a deed, absolute on its face, will be construed as such.

The defeasance is the essential part of a mortgage. (*Jackson v. Lodge*, 36 Cal. 60; 1 Jones on Mortgages, § 241.)

Had there been a defeasance in this case it must have been to the grantors Fisher and McClellan. It could not be made to the plaintiff, for he is a third party, and whatever else such an instrument can be, it is not a defeasance.

Leach & Parker, for Respondent.

Appellant claims, that as the conveyance was not executed by plaintiff, but by McClellan and Fisher, to him, it could not be a mortgage; and cites authorities to the effect, that where lands are conveyed by a deed absolute in form, in order to constitute the transaction a mortgage in law, there must be a defeasance to the mortgagor. The same authorities show that the rule was different in equity; and we claim that at law it has been changed by the sections of the Codes above mentioned. (See *Brinkman v. Jones*, 44 Wis. 498; also Jones on Mortgages, section 252.) The complaint alleges, and the Court finds that, at the date of the conveyance, plaintiff was the owner; and it matters not whether the instrument was a mortgage or deed of trust, the defendant having conveyed the property to innocent purchasers, and received the money therefor, must account to the owner.

The COURT:

This is an action to recover a balance of moneys received by defendant from the sales of property of plaintiff which had been conveyed to defendant as security, after deducting amounts which defendant is entitled to retain. The findings are full as to the facts that plaintiff was the owner of the property and caused it to be conveyed to defendant as security; as to the sales by defendant and the receipt by him of the proceeds, and as to the balance in his hands belonging to plaintiff. We see no error in the record.

Judgment affirmed.

[No. 8,090.—Department One.]

June 30, 1882.

ESTATE OF J. N. MONTGOMERY.

ESTATES OF DECEASED PERSONS—PROCEEDING FOR SALE OF REAL ESTATE—

STATUTE OF LIMITATIONS.—On the tenth day of April, 1878, an order for the sale of real estate was duly made by the Probate Court; but the property was not sold. On the eleventh day of April, 1881, the administrator filed another petition for the sale of the same property referring to the former order and stating that no sale had been made. An opposition was filed by the heirs on the ground that more than four years had elapsed after the claims (except three) were allowed before the filing of the petition; and that the application was barred by § 343 C. C. P.

Held: It is unnecessary in this case to decide the point suggested. The proceedings for subjecting property to sale for the payment of debts were commenced upon the filing of the first petition. There has been no revocation of the order made thereon; there is no statute requiring the sale to be made within any given time after the order, and the petition filed on this application, and the orders made thereon may be considered as in effect a continuation of the first application and of the proceeding then instituted.

Id.—*Id.*—Under the Code there is no privity in the sale of property for the payment of debts as between real and personal.

APPEAL from an order of sale of real and personal property in the Superior Court of Tehama County. MAYHEW, J.

R. A. Redman and *A. M. Rosborough*, for Appellants.

Appellants plead Sections 343 and 363 of the Code of Civil Procedure as a bar to granting said order. The petition, in such cases, is the commencement of a distinct proceeding in the nature of an action. (*Estate of Boland*, 55 Cal. 315; *Estate of Crosby*, *id.* 574.) The petition does not show that the indebtedness of the estate exceeds the value of the personal property which has come into the hands of the administrator, and in this respect does not state facts sufficient to show that the sale of real estate is necessary to pay indebtedness.

Chipman & Garter, for Respondent.

It is asserted that there is no necessity for the sale of the real estate because the claims constituting the greater portion of the indebtedness of the estate are barred by the Statute of Limitation under the provisions of Sections 343 and 363,

C. C. P. The cause of action of a creditor involved in his claim is the right to present the same for allowance and approval, after which approval he has no cause of action, because his claim stands as a judgment. (*Estate of Hidden*, 23 Cal. 363.)

No claim against any estate which has been presented and allowed is affected by the Statute of Limitations. (C. C. P., § 1569; *Estate of Schroeder*, 46 Cal. 305; *Dohs et al v. Wiloughby*, 9 P. C. L. J. 241.)

We now come to consider the question whether the present application as a distinct and definitive proceeding is: (1) barred by the Statute; or is: (2) in any manner affected by any Statute of Limitation. But we maintain that the proceeding is not subject to the Statute of Limitations, whether a special proceeding of civil nature or otherwise. We think the general Statute of Limitation was not intended to apply to probate proceedings, because it cannot be done without bringing it into direct conflict with the express provisions of Section 1569. The precise question, however, has been decided by the Supreme Court of this State. (*Estate of Schroeder* 46 Cal. 316.)

MYRICK, J.:

This an appeal from an order for the sale of real estate of the intestate.

The deceased died June 2, 1876. Letters of administration were issued June 24, 1876, to J. W. B. Montgomery. An inventory was filed, and on the first of July, 1876, the first publication was had of a notice to creditors to present their claims within ten months. The time expired May 1, 1877. Claims were presented, allowed and approved, amounting, exclusive of interest, to about one hundred and forty-nine thousand dollars. March 12, 1878, the administrator filed his petition for an order for the sale of all the property of the estate, and, after due notice and hearing, such order was made. Notices for the sale of the property at private sale were duly published and given, as authorized by the order, but no bid was received, and the real estate remains wholly undisposed of. The petition on this application was filed April 11, 1881. The heirs of the intestate filed an opposition to the petition,

on the ground that more than four years had elapsed after the claims (except three) were allowed, before the filing of the petition, and that an application for the sale of real estate was barred by Section 343, C. C. P. The Court below found that there had been no laches or unreasonable delay in the sale of the lands under the first order or in the present application. The administrator, in his petition, states as reasons, among others, why the property was not sold under the first order, that at the time the sale was ordered a general financial depression existed throughout this State, and a large amount of land was thrown upon the market; also that some portions of the real estate were involved in litigation, which could not be readily disposed of; and that for these reasons it was impracticable to complete the sale of the real estate under said order.

On this appeal the appellants present two points:

First—The appellants insist that a cause of action accrued to the administrator and to each creditor whose claim had been allowed so soon as it was ascertained that it was necessary to sell property to pay the debts; and more than four years having been permitted by them to intervene between the time it was known by all of them to be necessary to sell the property to pay the debts and the date of filing the petition. Section 343, Code of Civil Procedure, interposes a bar against this proceeding, which is an action or special proceeding in the nature of an action.

Second—The petition does not show that the indebtedness of the estate exceeds the value of personal property which has come into the hands of the administrator, and in this respect does not state facts sufficient to show that a sale of real estate is necessary.

Regarding the second point, it is sufficient to say that the petition states the value of the personal property undisposed of to be eight thousand four hundred and twenty-one dollars and seventy-seven cents, and the debts to exceed one hundred and twenty thousand dollars. Under the Code there is no priority in the sale of property for the payment of debts, as between real and personal.

The first point is urged more strenuously, and in view of some suggestions which have been made, would appear to be

more difficult of solution. In *Estate of Boland*, 55 Cal. 315, this Court, in speaking of a petition filed for the sale of real estate, used this language: "The petition is the commencement of a distinct proceeding in the nature of an action;" and in *Estate of Crosby*, 55 id. 583, the Court remarked, it may be perhaps a special proceeding of a civil nature, and as such subject to an appropriate section of the Code which treats of limitations.

In this case, however, it is not necessary to consider the effect of those suggestions, because neither of them has direct application to the question before us. In this estate, proceedings for subjecting property to sale for the payment of debts were commenced March 12, 1878, upon the filing of the first petition; there has been no revocation of the order made thereon; there is no statute requiring the sale to be made within any given time after the order; and we may consider the petition filed on this application, and the orders made thereon, as in effect a continuation of the first application and of the proceedings then instituted. The petition now before us sets out the former proceedings, giving the reasons why the sale was not then made, and is in some sense based upon those proceedings.

Order affirmed.

MCKINSTRY and MCKEE, JJ., concurred.

[No. 8,283.—Department One.]

June 30, 1882.

ESTATE OF J. N. MONTGOMERY.

FAMILY ALLOWANCE—INSOLVENT ESTATE.—It is the duty of the Court, after the expiration of one year from the granting of letters, to discontinue the allowance for the maintenance of the family, upon ascertaining the estate to be insolvent.

APPEAL from an order discontinuing family allowance, in the Superior Court of Tehama County. MAYHEW, J.

John F. Ellison, for Appellant.

The order making a family allowance, except the one provided by Section 1464 of Code of Civil Procedure, is a final

order. The order making an allowance under Section 1466, is an order for such an allowance out of estate as shall be necessary for maintenance of the family according to their circumstances during the progress of the settlement of the estate. If the Court can order administrator not to pay in future, it can compel Mrs. Montgomery to return the payments she has already received. It has the same power over the one as over the other. (Freeman on Judg. § 319, a; C. C. P. §§ 963, 1466, 1467, 1470.) The Codes in many sections make the claims of the family superior to the claims of creditors. (C. C. P. §§ 1467, 1469, 1626.)

Chipman & Garter, for Respondent.

Sections 1464-66 C. C. P. demonstrate that the allowance for family support during administration, is never to be deemed finally determined so as to be beyond the supervision of the Court.

The order fixing the allowance at one hundred and seventy-five dollars per month, which appellants claim was a final order, by its own terms attained the jurisdiction and power of the Court over the subject of allowances, by directing that that sum should be allowed "until the further order of the Court." (*Williams v. McDougall*, 39 Cal. 80.)

MYRICK, J.:

Deceased died intestate June 2, 1876, leaving him surviving a widow and two minor children. June 26, 1876, J. W. B. Montgomery was appointed administrator of the estate. August 14, 1876, the Probate Court made an order that one hundred and twenty-five dollars per month be paid to said widow for the support of herself and her two minor children. The real estate was appraised at one hundred and eighty-five thousand dollars; personal property remains in the hands of the administrator of the value of about eight thousand five hundred dollars. Unpaid claims, allowed and approved, now exist to the amount of, principal, about one hundred and twenty-six thousand dollars, interest, thirty-five thousand dollars. June 22, 1878, the Probate Court made an order increasing the family allowance to two hundred and fifty dollars per month. On the fifteenth of April, 1879, the allow-

ance was by order reduced to one hundred and seventy-five dollars per month, upon the application of creditors. On the seventeenth of August, 1881, certain creditors filed a petition that the family allowance be discontinued. This petition averred that the real estate had greatly depreciated in value, and that after the payment of the expenses of administration there would not remain sufficient to pay the debts, and that the estate is insolvent. The widow demurred to the petition, and the demurrer was overruled. No answer was filed, and the Court heard proofs of the allegations of the petition. From such hearing the Court found the allegations to be true, and that the estate is insolvent, and had been for more than one year prior to the date of the petition, and made an order discontinuing the family allowance. From such order this appeal is prosecuted by the widow.

It is urged, on behalf of the appellant, that the order fixing the family allowance is, conclusive, under Section 1466, C. C. P., during the progress of the settlement of the estate, and that the amount cannot be reduced. We do not think this view is correct. The amount to be allowed for the support of the family is peculiarly within the province of the Court; it must be such as in its judgment, may be necessary for the maintenance of the family, according to their circumstances; but, in case of an insolvent estate, the time must not be longer than one year after the granting of letters. Here is an absolute prohibition in case of insolvency. The Court had power, upon ascertaining the estate to be insolvent—nay, it was its duty—to discontinue the allowance. In this case the allowance had been paid for five years, and during more than one year of that time, the Court finds the estate had actually been insolvent.

Order affirmed.

MCKINSTRY and MCKEE, JJ., concurred.

[No. 8,036.—In Bank.]
June 30, 1882.

AMBROSE TAYLOR ET AL. v. THOMAS McCLAIN.

STATUTE OF LIMITATIONS—MORTGAGE REDEMPTION—FORECLOSURE.—Where a deed absolute in form is executed as a mortgage to secure a debt, the right to redeem and the right to foreclose are reciprocal, and when one is barred by the Statute of Limitations, the other is equally barred.

APPEAL from a judgment for the plaintiff in the Superior Court of Los Angeles County. HOWARD, J.

The Court below found "that plaintiff's action herein is not barred by either Sections 337, 338, or 378, C. C. P.," but also specifically found the date of the conveyance, and the date on which the indebtedness secured thereby became due; from it it appeared that prior to the commencement of the suit the time prescribed by the sections referred to had elapsed.

Smith & Brown, and A. W. Hutton, and Bicknell & White, for Appellant.

This action was instituted January 27, 1880, more than five years after the maturity of McClain's demand. Appellant's cause of action on this claim was certainly barred when the complaint was filed; McClain therefore could not, when this action was instituted, have sued the Taylors on this demand, nor can they now sue him. A deed absolute on its face, but intended as a mortgage, conveys the legal title. (*Hughes v. Davis*, 40 Cal. 117; *Espinosa v. Gregory*, id. 58; *Davenport v. Turpin*, 43 id. 604; *Pico v. Gallardo*, 52 id. 206.) In such cases the rights of mortgagor and mortgagee are reciprocal, and when the debt is barred the right to redeem is also barred. (*Grattan v. Wiggins*, 23 Cal. 16; *Cunningham v. Hawkins*, 24 id. 403; *Arrington v. Liscom*, 34 id. 365; *Espinoza v. Gregory*, *supra*.) Where a general finding and one which is special conflict, the latter will control. (*Hidden v. Jordan*, 28 Cal. 301.)

Barclay & Wilson and Brunson & Wells, for Respondents.

As to defendant's second point, the plaintiff's cause of action is barred by the Statute of Limitations, Section 2903,

1. *Taylor v. McClain*, 64 Cal. 513; *Henderson v. Grammar*, 68 Cal. 328.

property subject to a lien, has a right to redeem it from the lien at any time after the claim is due, and before his right of redemption is foreclosed. Again, the facts constituting plaintiff's cause of action were not discovered until the latter part of 1879, and within a few weeks of the commencement of this action. And plaintiffs are within the provisions of Section 338, C. C. P., subdivision iv.

Ross, J.:

We are of opinion that the judgment of the Court below is erroneous. The record shows that the instrument in question, though in form a deed absolute, was nevertheless executed to the defendant McClain as security for certain indebtedness of the plaintiffs assumed by him. It was therefore in legal effect a mortgage. The defendant paid the amount, and thereupon plaintiffs became indebted to him in the amount so paid. This indebtedness, for the security of which the instrument in question was given, arose and became due more than four years before the commencement of the action. When it became due, plaintiffs and defendant enjoyed reciprocal rights: plaintiffs the right to redeem the property given as security and the defendant the right to demand the debt. (*Grattan v. Wiggins*, 23 Cal. 16; *Cunningham v. Hawkins*, 24 id. 40 and other cases in this Court.)

More than four years having elapsed from the maturity of the debt, defendant's cause of action therefore became subject to a plea of the Statute of Limitations, as did also the plaintiff's right to redeem.

Viewed in the most favorable light for the plaintiffs, the action is one to redeem, to which the defendant pleaded among other defenses, the Statute of Limitations. This defense must be sustained, regardless of other points made.

Judgment and order reversed and cause remanded for new trial.

McKINSTRY, McKEE, and SHARPSTEIN, JJ., concurred.

[No. 7,973—In Bank.]

June 30, 1882.

T. W. DASHIELL v. H. SLINGERLAND.

JURISDICTION OF SUPREME COURT—CONSTITUTIONAL LAW—TRESPASS.—In an action for trespass on land in which the title of the plaintiff to the *locus in quo* was admitted, the amount alleged as damages and demanded in the prayer of the complaint was nine hundred dollars, and the verdict and judgment were for two hundred dollars.

Held: This Court has appellate jurisdiction of the case. [MORRISON, C. J., dissenting.]

ID.—ID.—JURISDICTION OF SUPERIOR COURT.—The settled rule is that the amount sued for exclusive of interest is the test of jurisdiction in this Court (as also in the Superior Court) in all cases where actions are brought to recover money. [MORRISON, C. J., dissenting.]

ID.—ID.—ID.—CASES DISTINGUISHED: *Gordon v. Ross*, 2 Cal. 156; *Doyle v. Seawall*, 12 id. 280; *Votan v. Reese*, 20 id. 90; *Dunphy v. Guindon*, 13 id. 28; *Zabriskie v. Torrey*, 20 id. 173; *Meeker v. Harris*, 23 id. 286; *Melson v. Melson*, 2 Munf. 542; *Tipton v. Chambers*, 1 Metc. 565; *Walker v. U. S.*, 4 Wall. 163; distinguished.

APPEAL from a judgment for the plaintiff and from an order denying a new trial in the Superior Court of Mendocino County. MCGARVEY, J.

J. A. Cooper, for Appellant.

Thomas B. Bond, for Respondent.

This Court has no jurisdiction of the appeal because the judgment is for only a money demand, does not amount to three hundred dollars, and defendant appeals.

THORNTON, J.:

The plaintiff brought this action to recover of defendant damages for a trespass on his land, and tearing down and removing a fence therefrom, and leaving his pasture land uninclosed, whereby he avers that he has suffered damage to the amount of nine hundred dollars. The defendant in his answer admitted the title of the plaintiff to the land on which the wrongs are alleged to have been committed. On the trial the jury rendered a verdict for plaintiff for two hundred dollars, on which judgment was accordingly entered. The defendant moved for a new trial, which was denied, and

1. *Tyler v. Connolly*, 65 Cal. 30.

he appealed from the judgment and order denying a new trial. Respondent moves to dismiss the appeal on the ground that this Court is without jurisdiction, as the judgment appealed from is less than three hundred dollars.

By the 4th section of Art. vi of the Constitution it is provided that this Court "shall have appellate jurisdiction in all cases in equity, except such as arise in Justice's Courts; also in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars," etc., etc. The remainder of the section has no application and is therefore not inserted. The statute in relation to the appellate jurisdiction of this Court, as far as concerns this cause, follows the language of the Constitution. (C. C. P., § 52.)

It will be seen from the above that the title to the land was not involved in the action, as the defendant admitted the title of plaintiff.

The portion of the section of the Constitution above referred to, which is invoked by counsel for the motion, is that which relates to the demand, value of the property in controversy. It is prescribed that the demand, exclusive of interest shall amount to three hundred dollars, or the value of the property in controversy shall amount to three hundred dollars, in order that this Court may exercise its appellate jurisdiction.

The Constitution of this State, as amended in 1862, (see Art. vi, Sec. 4, of that instrument), contained language as to the jurisdiction of the Supreme Court as to these matters, identical with the present Constitution. That language was construed in the case of *Solomon v. Reese*, 34 Cal. 33. The plaintiff in the case cited had judgment for three hundred dollars, and thirty-two dollars and sixty-one cents interest. He appealed, and the question was raised as to the appellate jurisdiction of the Supreme Court under the amendment of 1862. The Supreme Court sustained the jurisdiction, considered the cause on its merits and decided it. The Court, per Sanderson, J., used this language:

"The point made by the respondent, that this Court has no

jurisdiction, is not tenable. In actions for the recovery of money, this Court has jurisdiction, 'if the demand, exclusive of interest, amounts to three hundred dollars.' (Const. Art. vi., Sec. 4.) The demand, exclusive of interest, in this case, amounts to five hundred and fifty dollars. The language of the Constitution in respect to the jurisdiction of this Court is the same as it is in respect to the jurisdiction of the District Court, and there can be, therefore, no difference in the rules by which questions as to the jurisdiction of the subject matter are to be determined in the two Courts. For the purpose of ascertaining whether the District Court has jurisdiction, we look to the complaint, and in this class of cases, if the sum sued for amounts to three hundred dollars, exclusive of interest, that Court has jurisdiction, and by parity of reason, this Court has jurisdiction on appeal. The amount sued for, exclusive of interest, is the test of the jurisdiction of this Court, as well as of that of the District Court, regardless of the judgment of the latter Court. We dissent entirely from the dictum of the Court in the case of *Votan v. Reese*, 20 Cal. 90, to the effect that where the plaintiff recovers in the District Court less than he sues for, the test of the jurisdiction of this Court, in the event the plaintiff appeals, is the difference between the judgment of the District Court and the demand made in the complaint, exclusive of interest. All civil cases which the District Courts have jurisdiction to try, this Court has jurisdiction to review, no matter what the judgment of the District Court may have been. If the plaintiff sues to recover a demand for five hundred dollars, and the District Court gives him a judgment for three hundred only, his demand does not thereby become converted into a demand for two hundred dollars, for the purposes of an appeal, should he be dissatisfied with the judgment and desire to bring his case to this Court. On the contrary, in the sense of the Constitution, his demand in this Court is precisely the same that it was in the Court below, and is to be ascertained by looking to the complaint and not by deducting the judgment of the District Court from the demand alleged in the complaint. In other words the *ad damnum* clause in the complaint is the test of jurisdiction in this Court as well as in the Court below. (*Maxfield v. Johnson*, 30 id. 546.)"

The same rule is laid down by the same Court in *Maxfield v. Johnson*, 30 id. 546. But that was a case arising in a Justice's Court, and it does not appear that the point so clearly arose as in *Solomon v. Reese*.

The same point was made in *Pennybecker v. McDougal*, 48 Cal. 161, but the Court paid no attention to it in rendering its judgment in the cause, no doubt deeming it so well settled by the former decisions that it deserved no further consideration. In the last case the plaintiff sued to recover property alleged to be of the value of four hundred dollars. He had judgment for a return of the property, and if a return could not be had, then for its value, assessed at two hundred and twenty-five dollars. The defendant appealed. The Court heard the case, and reversed the judgment, and remanded the cause with an order to the Court below to modify the judgment by reducing the damages to seventy-five dollars.

The rule settled by these cases is that the amount sued for, exclusive of interest, is the test of jurisdiction in this Court as in the former District Court (and the same may be said now of the jurisdiction of the Superior Court) in all cases where actions are brought to recover money.

It is true that this was said in a case (*Solomon v. Reese*) where the plaintiff appealed, but we are of opinion that the same rule is correct where the defendant appeals. The demand referred to in the Constitution and the statute, is the amount sued for in the action, exclusive of interest. The defendant makes no demand, unless probably, when he sets up a counter-claim. The plaintiff makes the demand, and the defendant only seeks to be relieved from the plaintiff's demand. In the case before us the demand is nine hundred dollars, expressed in the *ad damnum* clause.

Our judgment is that this Court has appellate jurisdiction in this case. The cases cited by counsel for respondent were made under Constitutions or statutes in which the provisions on this matter were manifestly different from our Constitution and statute.

Gordon v. Ross, 2 Cal. 156; *Doyle v. Seawall*, 12 id. 280; *Votan v. Reese*, 20 id. 90, were decided under the Constitution of 1849, and that Constitution provided that the Supreme Court should have appellate jurisdiction in all cases where

"the matter in dispute" exceeded two hundred dollars. These cases, so far as they are in conflict with the decision here, are governed by the words "matter in dispute" and the matter in dispute where the defendant appealed, was held to be the amount of the judgment recovered against him in the Court below. It will be observed that the Constitution of 1849 did not exclude interest in fixing the appellate jurisdiction of the Supreme Court. (*Votan v. Reese*, 20 Cal. 89; see also *Dunphy v. Guindon*, 13 id. 28; *Zabriskie v. Torrey*, 20 id. 173; *Meeker v. Harris*, 23 id. 286.)

Bolton v. Landers, 27 Cal. 106, though under the Constitution as amended in 1862, has no application. *Gillespie v. Benson*, 18 id. 409, was an appeal by plaintiff and it was sustained. The action was brought in the District Court, and the plaintiff sued for four hundred and sixty dollars, for goods sold and delivered. Under all the Constitutions such appeal would be entertained.

The language is also different in the statutes as to the other cases cited by the respondent's counsel. (*Melson v. Melson*, 2 Munf. (Va.), 542; *Tipton v. Chambers*, 1 Metc. (Ky.), 565; *Walker v. United States*, 4 Wall, 163.) In those cases the words were "matter in controversy" (1 Rev. Code Va., 198), or "value in controversy" (Stats of 1857-58 of Ky., p. 58), or "matter in dispute." This last was the language used in the Act of Congress under which the appeal was prosecuted. (4 Wall, 163.)

The rule laid down in *Solomon v. Reese*, meets our approval. It is just and equitable, as it accords to both plaintiff and defendant an equality of right in prosecuting appeals.

No property is in controversy here and the clause in relation to the value of the property in controversy need not be considered.

We have examined the errors assigned and find the ruling of the Court in regard to them correct.

There was evidence on all the issues on which the jury was to pass. There was some conflicting evidence, but we can not reverse on this account.

The motion to dismiss is overruled. Judgment and order affirmed.

McKEE, ROSS, and MCKINSTRY, JJ., concurred.

MORRISON C. J., dissenting.

Action in the nature of trespass to recover nine hundred dollars damages.

There was a jury trial in the case, with verdict and judgment in favor of plaintiff for two hundred dollars, and the appeal is by defendant. Has this Court jurisdiction? The provision of the Constitution applicable to the case is, that the appellate jurisdiction of the Supreme Court shall extend to all cases "in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars."

It is said that the decisions of the Court upon this question are conflicting, and I will notice them briefly.

The first case to which I will refer is that of *Dunphy v. Guindon*, 13 Cal. 28. That was an action commenced in a Justice's Court to recover the sum of ninety-eight dollars and ninety-one cents. On appeal to the County Court the plaintiff was nonsuited, and from the judgment of nonsuit he appealed to this Court. It was held that the Supreme Court had no jurisdiction, and the Court say: "By matter of dispute is meant the subject of litigation. It can have no other rational meaning. It is the matter for which suit is brought—the matter upon which issue is joined, and in relation to which witnesses are examined, juries are called and the verdict rendered. The costs are merely incidental to the suit."

The next case is *Votan v. Reese*, 20 Cal. 89, and in that case the Court say: "To enable us, therefore, to review the ruling of the Court below upon the subject of costs, in an action of this character, *where the defendant appeals*, the judgment, independent of costs, must exceed two hundred dollars. Where the plaintiff is appellant in such action, if the verdict be for the defendant, it will be sufficient if the amount claimed by the complaint exceeds that sum; or if the verdict is for the plaintiff, if the difference between its amount and that claimed exceeds that sum." This case refers to the case of *Gillespie v. Benson*, 18 Cal. 409, where it was held

that "the amount in dispute, within the meaning of the Constitution, is not determined where the *plaintiff* is appellant, by the amount of the offset pleaded by the defendants or found by the jury. In such case the amount claimed by the complaint, the action being for a debt or damages only, is to be considered in determining whether this Court has appellate jurisdiction in the case."

The next case is that of *Skillman v. Lachman*, 23 Cal. 199, in which the following language is found: "Where the *plaintiff* is appellant, and the judgment is for the defendant, the jurisdiction of this Court is determined by the amount claimed by the complaint, for that is the 'amount in dispute' in such cases. (*Gillespie v. Benson*, 18 Cal. 410; *Votan v. Reese*, 20 id. 89.) But if the appeal is by the plaintiff from a judgment in his favor, then the 'amount in dispute' is the difference between the amount of the judgment and the sum claimed by the complaint. (*Votan v. Reese*, 20 Cal. 89.) So, upon the same principle, if the appeal is taken by the *defendant* from a judgment rendered against him for a sum exceeding two hundred dollars, exclusive of costs and percentage, this Court has jurisdiction of the case, because the *amount of the judgment* is the 'amount in dispute' on the appeal."

The above cited cases seem to hold that when the appeal is taken by the *defendant* the jurisdiction of the appellate Court does not depend upon the amount *claimed*, but is determined by the *amount of the recovery or judgment*. Then follows the case of *Maxfield v. Johnson*, 30 Cal. 545, where it is said that, "The *ad damnum* clause in the complaint is the test of jurisdiction, and the costs of the action constitute no part of the amount in controversy." In that case the amount sued for was only two hundred and ninety-eight dollars, and it is very clear that neither party had the right of appeal to the Supreme Court. Following the case last referred to is that of *Solomon v. Reese*, 34 id. 28, and that case holds that, "The amount sued for, exclusive of interest, is the test of the jurisdiction of this Court, as well as that of the District Court. We dissent entirely from the *dictum* of the Court in the case of *Votan v. Reese*, 20 id. 90, to the effect that where the plaintiff recovers in the District Court less than he sues for, the test of the jurisdiction of this Court, in the event the

plaintiff appeals, is the difference between the judgment of the District Court and the demand made in the complaint, exclusive of interest. All civil cases which the District Courts have jurisdiction to try, this Court has jurisdiction to review, no matter what the judgment of the District Court may have been. * * * In other words, the *ad damnum* clause in the complaint is the test of the jurisdiction in this Court, as well as in the Court below. (*Maxfield v. Johnson*, 30 Cal. 546.)"

If this case were accepted as law, in the broad sense in which it speaks of the appellate jurisdiction of this Court, there would be an end of the controversy. But the case is not authority upon the point which I am now considering, because the appeal was taken by the *plaintiff*, and the question whether the *defendant* can appeal, when the judgment is against him for a less amount than three hundred dollars, was not before the Court, and what appears there, which is at all applicable to an appeal by a defendant in such a case, is mere *obiter dictum*.

There may be, and I believe there are, other cases in which the question of the appellate jurisdiction of this Court has been passed upon, either directly or indirectly; but the cases as a whole are so unsatisfactory, and apparently so much in conflict, that I feel at liberty to treat the question as if it were a new one in this Court, and to determine it according to what I believe to be a true construction of the Constitution and a correct exposition of the law.

It may aid in the determination of this question to examine a few of the cases decided by the Supreme Court of the United States, and involving the appellate jurisdiction of that tribunal.

By the Judiciary Act of September 24, 1879, it was provided that "all final judgments of any Circuit Court, or of any District Court acting as a Circuit Court, in civil actions brought there by original process, or removed there from Courts of the several States, and all final judgments of any Circuit Court in civil actions removed there from any District Court by appeal or writ of error, wherein the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars, may be re-examined and reversed or af-

firmed in the Supreme Court upon a writ of error." And by the Act of third of March, 1803, it is further provided that "an appeal shall be allowed to the Supreme Court from all final decrees of any Circuit Court, or of any District Court acting as a Circuit Court, in all cases of equity and of admiralty and maritime jurisdiction, when the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars, and the Supreme Court is required to receive, hear and determine such appeal."

It will be observed that whether the case is removed to the Supreme Court by writ of error or by appeal, the "matter in dispute," exclusive of costs, must exceed the sum or value of two thousand dollars. I will not attempt a citation of all the cases reported upon this question, but will content myself with a reference to two or three of them.

In *Gordon v. Ogden*, 3 Peters, 33, Chief Justice Marshall, speaking for the entire Court, says: "This Court has jurisdiction over final judgments and decrees of the Circuit Court when the matter in dispute exceeds the sum of two thousand dollars. The jurisdiction of the Court has been supposed to depend on the sum or value of the matter in dispute in this Court, not on that which was in dispute in the Circuit Court. If the writ of error be brought by the plaintiff below, then the sum which his declaration shows to be due may still be recovered, should the judgment for a smaller sum be reversed; and consequently the whole sum claimed is still in dispute. But if the writ of error be brought by the defendant in the original action, the judgment of this Court can only affirm that of the Circuit Court and consequently the matter in dispute cannot exceed the amount of that judgment. Nothing but that judgment is in dispute between the parties." To the same effect is the case of *Knapp v. Banks*, 2 How. 73, where Mr. Justice Story, delivering the opinion of the Court, says: "The amount in controversy is to be decided by the sum in controversy at the time of the judgment, and not by any subsequent additions thereto, such as interest. The distinction constantly maintained is this: Where the plaintiff sues for an amount exceeding two thousand dollars, and the *ad damnum* exceeds two thousand dollars, if by reason of any erroneous ruling of the Court below, the plaintiff recovers

nothing, or less than two thousand dollars, there, the sum claimed by the plaintiff is the sum in controversy for which a writ of error will lie. But if a verdict is given against the defendant for a less sum than two thousand dollars, and judgment passes against him accordingly, then it is obvious that there is, on the part of the defendant, nothing in controversy beyond the sum for which the judgment is given, and consequently he is not entitled to any writ of error. We cannot look beyond the time of the judgment in order to ascertain whether a writ of error lies or not."

The case of *Merrill v. Petty*, 16 Wall. 338, is the last decision of the Supreme Court of the United States on this point, to which I will refer, and in that case Mr. Justice Clifford, delivering the opinion of the Court, says: "Since the appeal was entered in this Court the libellants, as appellees, have filed a motion to dismiss the appeal, because the matter in dispute does not exceed the sum or value of two thousand dollars, exclusive of costs, as required by the twenty-second section of the Judiciary Act.

"Much discussion of that question is certainly unnecessary, as the rule in this Court has been settled for the period of sixty years, that where the writ of error is brought by the defendant in the original action, the matter in dispute is the amount of the judgment rendered in the Circuit Court, as this Court can only affirm the judgment rendered in that Court."

In the Act of Congress the language conferring appellate jurisdiction is, "when the matter in dispute, exclusive of costs, exceeds two thousand dollars," and in the Constitution of this State, of 1863, the words used are "in which the demand, exclusive of interest, or the value of the property in controversy amounts to three hundred dollars," and in the Constitution now in force the same language is employed. By the Constitution of 1849, it was provided that the "Supreme Court shall have appellate jurisdiction in all cases when the *matter in dispute* exceeds two hundred dollars." It will be observed that the language found in the first Constitution of this State was, "matter in dispute," and is the same language that is used in the Act of Congress conferring appellate jurisdiction upon the Supreme Court of the United States,

but in the subsequent Constitution it has been changed so as to read, when the "demand, exclusive of interest, or the value of the property in controversy amounts to three hundred dollars." But these are convertible terms and they mean the same thing. In the case of *Knapp v. Banks*, referred to above, Mr. Justice Story speaks of "the amount in controversy," and treats that language as synonymous with the "matter in dispute," and there is no good reason for doubting that the framers of the old as well as of the new Constitution intended no change in the meaning by the slight change made in the phraseology. The "matter in dispute," and "the demand in controversy," are convertible terms, and bear the same signification.

We are to look at the object of the framers of the Constitution in fixing a limitation to the appellate jurisdiction of this Court, which was, under the provisions of the Constitution of 1849, that no case should be appealed to this Court in which the matter to be affected by the judgment of this Court did not exceed the sum of two hundred dollars, and that no case shall be brought here under the present Constitution when the judgment of this Court shall not operate upon a claim, demand or matter in controversy, amounting in value to three hundred dollars. The *ad damnum* clause in the complaint is the test, when the plaintiff is the appellant, because, although his recovery in the Court below may be for a less sum than three hundred dollars, he has a right to urge in this Court that his recovery should have been for more than three hundred dollars, and that it was reduced below that sum by an error committed in the Court below. But when the defendant is appellant, and judgment against him is for the sum of two hundred dollars, he can not assert in this Court that the plaintiff's demand against him amounts to three hundred dollars. If the plaintiff brings his action to recover three horses of the value of one hundred dollars each, obtains a judgment for only one, and the defendant appeals, the controversy is about one horse only, and the other two are eliminated from the controversy. The mere statement of the proposition is sufficient; it needs no argument to support it. If the rule were otherwise, the defendant might bring up for review a judgment against him for *one dollar*, and thus the very end and purpose of the

Constitution in limiting the jurisdiction of this Court to demands amounting to three hundred dollars, or to cases where the property in controversy is of that value, would be utterly defeated.

I therefore think that, upon principle and authority, the appeal in this case should be dismissed. The decisions of the highest judicial tribunal in the country sustain the view I take of the question of jurisdiction, and in consideration of the large number of appeals to this Court, many of which are frivolous and begotten in a spirit of litigiousness, I do not regret that a fair and full consideration of the question of jurisdiction leads me to this conclusion. I therefore think the appeal should be dismissed.

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AMENDMENT.

1. AMENDMENT—DISCRETION OF COURT.—When, in the course of a trial, it is discovered that pleadings are so defective that the real subject of dispute cannot be finally determined, the Court, if an application is made therefor, should allow amendments on such terms as may be just.—*Farmers' Nat. Gold Bank v. Stover*, 388.
2. ID.—ID.—The fact that the new matter set up by way of amendment was known to the defendant at the time of filing his original answer, is no good reason why the amendment should not be permitted.—*Id.*

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3. *Id.*—*Id.*—An amendment of pleadings should be allowed at any stage of the trial when it is necessary for the purposes of justice, and whenever it is not done, it is error.—*Id.*

4. AMENDMENT OF ANSWER—DISCRETION OF COURT—STREET ASSESSMENT—PRACTICE.—In an action against the appellants and other defendants to foreclose a street assessment lien upon a lot in San Francisco alleged to be the property of defendants, the appellants—having in their original answer admitted ownership of the premises in dispute—moved for leave to file an amendment, in which by way of separate defense they denied ownership; and the motion was denied.

Held: The refusal to allow the filing of the amendment, under the circumstances in which the application was made, was not an abuse of discretion with which this Court will interfere.—*Harney v. Corcoran*, 314.

5. *Id.*—*Id.*—*Id.*—*Id.*—AMENDMENT OF COMPLAINT—SERVICE OF AMENDMENT.—Upon the case being called for trial the plaintiff dismissed the action as to certain of the defendants not served, and by leave of Court amended the complaint by erasing their names from the title; and thereupon the appellants moved for leave to answer the complaint as amended by refiling the amendment previously offered—which motion was denied.

Held: The amendment of the complaint was not such an amendment as the law or rules of the Court required to be served upon the defendants, or which entitled them to answer.—*Id.*

6. AMENDMENT TO COMPLAINT—ANSWER—DEFAULT—PRACTICE.—Where a plaintiff amends in matter of substance, he, in effect, opens the default on the original pleading, and must serve his amended pleading upon the parties including the defaulting defendant.—*Thompson v. Johnson*, 292.

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APPEAL.

1. APPEAL—FILING OF THE UNDERTAKING.—The notice of appeal was served upon the attorneys of the adverse parties on the eighteenth day of December, 1879, and (according to the endorsement of filing appearing in the transcript) filed with the undertaking, January 30, 1880.

Held: The undertaking not having been filed within five days after service of the notice the appeal must be dismissed.—*Boyd v. Burrell*, 280.

2. *Id.*—*Id.*—CORRECTION OF RECORD—CLERK.—Affidavits were filed to the effect that the notice and undertaking came to the hands of the Clerk on December 21st, and counter-affidavits to the effect that the same were not filed by the Clerk until January 30th, on account of the non-payment of the fees in advance, and that appellants were notified by the Clerk at the

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time of receiving the papers that the same would not be filed until the fee was paid.

Held: The record of the Court below cannot be altered or amended by proof made in this Court; if it is incorrect, that must be made to appear by proper evidence to the Court below, which has power to alter it so as to make it speak the truth. It would be a departure from all principle to allow a record sent to this Court to be assailed by evidence of less dignity than a record.

Held, further: The clerk was justified in refusing to file the notice and undertaking until his fee was paid.—*Id.*

3. *Id.*—*Id.*—*Id.*—CASE DISTINGUISHED.—*Tregambo v. Comanche M. & M. Co.*, 57 Cal. 501, distinguished.—*Id.*
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Held: Accordingly in this case (THORNTON, J., dissenting), that the cause should be remanded for a new trial.—*Schroeder v. Schweizer Lloyd Transport Versicherungs Gesellschaft*, 468.

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6. APPEAL FROM JUDGMENT—DISMISSAL.—The transcript does not contain the judgment from which the appeal purports to be taken, and the appeal therefore can not be entertained.—*People v. Sing Lum*, 6.
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Held: It is not for the Clerk to determine what papers or evidence the Court acted upon; and his certificate must be disregarded.—*Walsh v. Hutchings*, 228.

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10. **APPEAL IN PROBATE PROCEEDINGS—APPEALABLE ORDER.**—Appeal from an order vacating a decree of distribution.

Held: Appealable judgments and orders in probate proceedings are all enumerated in the third Subdivision of Section 963, Code of Civil Procedure; and as the order appealed from is not therein mentioned, it is not an appealable order.—*Estate of Calahan*, 232.

11. **DISMISSAL OF APPEAL.**—Appeal dismissed for failure to file transcript within the time prescribed by the rules.—*Smith v. Arnold*, 234.
12. **DISMISSAL OF APPEAL.**—In this case the appellant having failed to file the transcript within the time prescribed by the rules, notice to dismiss the appeal was served upon him, but pending the appeal leave was given him to file the transcript.

Held: The leave given to file the transcript was not the equivalent of an extension of time under the rules, because such an extension was grantable only for twenty days after the prescribed time; and the liminary time had elapsed long before the transcript was filed. Nor was there an adjudication of the respondent's right to a dismissal by granting leave to file the transcript, for leave was given subject to respondent's pending motion to dismiss.—*Page v. Latham, Jr.*, 601.

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1. **ASSAULT WITH A DEADLY WEAPON—SUFFICIENCY OF EVIDENCE TO SUSTAIN VERDICT.**—Unless the evidence is so slight that the Court below would be justified in directing a verdict for defendant, this Court is not authorized to reverse the judgment upon the ground that the evidence does not sustain a verdict of guilty. If there is a conflict, it is for the jury, under proper instructions, to determine the credibility of witnesses.—*People v. Bird*, 7.

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towards such other person with menacing gestures, and with a purpose to use such weapon, an assault is committed, though such person is prevented from striking or using the weapon before he comes near enough to do so."—*Id.*

3. **Id.—RELEVANCY OF INSTRUCTIONS.**—The Court charged the jury as follows: "Further in this connection the Court, of its motion, instructs you that if a man has been for a period of two years or thereabouts in the quiet, peaceable, and exclusive possession of a house and certain grounds immediately surrounding the same, and necessary to the comfort and enjoyment of such house, and during such time has resided in such house and has occupied and used such ground with his family, and another person, without his consent, places timbers upon such ground which obstruct the free use and enjoyment of such house and grounds, the man who has so had the possession of said house and grounds and occupied the same with his family, may the next day after the timbers are so placed upon such grounds, remove the same from such grounds. And if it becomes necessary to saw such timbers up to remove them, he may do so. And if he is interfered with in such removal, he may use so much force as is necessary to protect his person in so doing."

Held: As there was no evidence tending to establish the circumstances recited as possible facts, the charge was clearly erroneous.—*Id.*

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ATTACHMENT—SUBSEQUENT MORTGAGE FOR OWELTY OF PARTITION.—The interest of M., an undivided half, in a tract of land owned by him as tenant in common with S., was attached by A. Subsequently by a judgment of partition a specific portion of the tract was allotted to M.—she however, being required by the judgment—in order to equalize the partition, to execute a mortgage to S. upon her allotment for one hundred and eighty-five dollars. Afterwards the interest of M. in the tract allotted to her was sold under execution in the attachment suit, and A. became the purchaser and received his deed, and having been made party to a suit to foreclose the mortgage of S. claimed that his title was paramount to the mortgage.

Held: The plaintiff was entitled to have foreclosure of his mortgage upon whatever interest M. held in the premises in excess of the undivided one half held by her at the time of the levy of A.'s attachment.—*Whitney v. McCoy*, 627.

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ATTEMPT TO COMMIT ROBBERY—INSTRUCTIONS.—Information for an attempt to commit robbery. The Court instructed the jury as stated in the opinion, and refused to grant an instruction asked by the defendant.

Held: The charge of the Court was correct and embodied the instruction refused.—*People v. Cadd*, 640.

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BATTERY—PUNISHMENT—HABEAS CORPUS.—The defendant was convicted of the crime of battery and sentenced to three years imprisonment in the House of Correction.

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Held: A mistake in entitling a bill of exceptions is not a sufficient ground for refusing to settle it.—*People v. Crane, Judge, etc.*, 279.

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- 2. AFFIDAVIT UPON APPLICATION FOR WRIT OF CERTIORARI—PETITION.**—The affidavit upon an application for a writ of certiorari stated in effect that judgment had been rendered in a Superior Court against the plaintiff for the sum of one hundred dollars and eighty cents for goods sold, etc., and that the said judgment is in excess of the jurisdiction of the said Court.

Held: It does not appear from the petition, that the Court had not jurisdiction. The action may have been commenced in a Justice's Court, and appealed to the Superior Court.—*Cunningham v. Superior Court*, 576.

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2. ID.—ID.—ID.—A person may by a single act endeavor to accomplish two or more criminal results. In such a case there can be no doubt that if the indictment sets forth the act and the intent to commit the two or more offenses according to the fact, it will not be open to the objection of duplicity. There is but one attempt, though the object aimed at is multifarious.—*Id.*

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CITY HALL COMMISSIONERS—POWER TO EMPLOY COUNSEL.—Appeal from a judgment denying a writ of mandamus to the City Auditor to audit a claim of the plaintiffs allowed by the Board of City Hall Commissioners July 21, 1880, for professional services as attorney.

Held: The Board of City Hall Commissioners had no authority to employ or pay counsel; such payment is prohibited by Section 12 of the Act of March 24th, which was in force when the employment of the plaintiffs took place.—*Greathouse v. Dunn*, 311.

CLAIM AGAINST COUNTY.

CLAIM AGAINST COUNTY—PHYSICIAN'S SERVICES ON POST MORTEM EXAMINATION—BOARD OF SUPERVISORS.—The claim of the plaintiff (a physician), certified by the coroner, for "making a trip from Petaluma to Timber Grove and making a post mortem examination on the body of William Johnson and taking the stomach of said deceased to San Francisco for analysis"—was presented to the Board of Supervisors, and the Board refused to consider the claim on the ground among others that it did not give all the items as required by Section 4072 Political Code.

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CONTRACT, CONSTRUCTION OF.

CONSTRUCTION OF CONTRACT—ATTACHMENT—REASONABLE TIME.—The defendant in this case, as sheriff, under a writ of attachment, at the suit of the plaintiff, seized \$1,399.11 coin as the property of the judgment debtor which was claimed by one S.; who on the same day brought suit for its recovery. The defendant having demanded indemnity, the plaintiff gave him a bond and also signed a written agreement that the defendant might retain for a reasonable time all moneys that might come into his hands by reason of said attachment or any execution to be issued in said action. After the plaintiff recovered judgment, the Court—pending the suit of S. against the defendant—made an order directing the sheriff, upon the delivery to him of a written undertaking approved by the Court in the sum of \$1,800, to pay into Court, or to his successor in office holding the execution, the money taken under the attachment.

CONTRACT, CONSTRUCTION OF (Continued).

Held: The reasonable time stipulated for in the contract is to be considered with reference to the fact that S. claimed the money, and might endeavor to establish that claim in the Courts. The plaintiff by his agreement has authorized the defendant to rely for his security against the claim of S. not only on the bond but on the money, and he is not entitled to the order while the action of S. is pending.—*Scherr v. Little*, 614.

See GUARANTY; ORDINANCE; REAL ESTATE BROKER.

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CORPORATION.

1. BEQUEST TO RELIGIOUS CORPORATION.—Bequest of two thousand dollars "to the Wardens and Vestrymen of St. John's Episcopal Church of Stockton, for the purpose of purchasing a chime of nine bells, for the benefit of the Church." St. John's Episcopal Church of Stockton was a corporation duly organized for religious purposes under the Act of April 22, 1850, entitled "An Act concerning corporations."

Held: Under the provisions of the Act the corporation is expressly authorized to take by will.—*Estate of Eastman*, 308.

2. ID.—STATUTES CONTINUED IN FORCE BY CODES.—By § 288 C. C. the provisions of the Act of April 22, 1850, were continued in force as to corporations created under them.—*Id.*

See TAXATION, 1, 5, 6, 7, 18, 19, 20, 21.

COUNTY. See CLAIM AGAINST.

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DEATH, ACTION FOR.

1. ACTION BY FATHER FOR DEATH OF SON—NEGLIGENCE—RELEASE—COMPETENCY TO CONTRACT—SUFFICIENCY OF EVIDENCE—INSTRUCTIONS.—The evidence held sufficient to justify the verdict, and the instructions of the Court below with regard to negligence and the mental competency of the plaintiff to execute the release, approved.—*Crowley v. City Railroad Co.*, 628.

DEATH, ACTION FOR (Continued).

2. ACTION FOR DEATH CAUSED BY NEGLIGENCE—SUFFICIENCY OF EVIDENCE—VERDICT.—In an action by the widow and administratrix of a deceased person for damages for the death of the intestate alleged to have been caused by the negligence of the defendant, the jury rendered a verdict for the plaintiff.

Held: The question of evidence was submitted to the jury under instructions as favorable to the defendant as it could ask, and under instructions it did ask for, and as there was evidence from which negligence might be inferred the verdict should not be disturbed.—*Cook, Adm'x, v. Clay St. Hill Railroad Company*, 804.

3. ID.—ADMISSIBILITY OF EVIDENCE.—1. The plaintiff was allowed to testify that it was the usual custom of deceased, during his married life, to be at home after business hours, and that they had lived a happy married life; that for eight years prior to his death she had been an invalid and unable to leave the house, and that during that time he had been very kind and attentive, and that she was dependent upon him. 2. The daughter of deceased was allowed to testify that he was kind as a father; that the social and domestic relations as to the family on his part were happy, and that he was kind and loving to plaintiff. 3. The plaintiff was permitted to testify that after Mr. Cook had been taken to his home she discovered pieces of flesh.

Held: The first and second points above stated are fully covered by § 377 C. C. P. "Such damages may be given as under all the circumstances of the case may be just"—and by the decision of this Court in *Beeson v. Green Mountain G. & S. Co.*, 57 Cal. 20. As to the third point there is nothing in the case to show that any damages were asked or given for suffering borne by the deceased; the action was for negligently causing his death; and the evidence given was of circumstances attendant upon the injury.—*Id.*

4. ID.—DAMAGES.—The damages found (eight thousand dollars) were not excessive.—*Id.*, 805.

DECISION AGAINST LAW. See NEW TRIAL, 2.

DEDICATION OF STREET.

1. DEDICATION OF STREET—ABATEMENT OF NUISANCE—INJUNCTION—ACTION BY THE STATE.—In an action by the people of the State to have certain premises in the City of Oakland adjudged to be a public street and for the abatement of obstructions therein, and for an injunction the Court, (upon the evidence stated in the opinion), found that the land in question was the property of the defendants, and had never been dedicated by them or their predecessors in title as a street, and judgment was entered for them accordingly. (McKee, J., and Ross, J., dissenting.)

Held: The evidence shows a dedication by defendant's grantors; and the Court erred in finding to the contrary. The elements entering into and constituting a dedication, viz., an intention by the owner, clearly indicated by his words or acts to dedicate the land to public use, and an acceptance by the public of the dedication, established by the use by the public of the land for the purpose to which it had been dedicated, are clearly manifested.—*People ex rel. Harris v. Blake*, 497.

DEDICATION OF STREET (Continued).

2. **ID.—EVIDENCE.**—On the trial the relator offered to prove certain declarations by predecessors in title of the defendant (before any conveyance by them) to the effect that the premises in controversy were a public street, but the evidence was excluded by the Court. *Held*: The evidence was admissible.—*Id.*

DEED.

1. **DEED—MENTAL INCOMPETENCY.**—The Court found that on the sixteenth day of November, 1875, and before and after that date, L. K. was of unsound mind—his mental unsoundness consisting of a fixed insane delusion in regard to religion, to wit: that he had incurred the displeasure of God, and could only expiate his sins by refraining from partaking of food; that he also during said time had occasional paroxysms of *melancholia*; that on that day he signed, acknowledged and delivered to M. K. (his wife) a deed of gift of the premises in controversy; that said L. K. at the time he made and delivered the deed, understood the nature, force and effect of the act, and that said act was not the result of his insane delusion.

Held, that the finding was sustained by the evidence, and that the deed was valid.—*Kidder v. Stevens*, 414.

2. **ID.—DELIVERY—CONFLICT OF EVIDENCE.**—The fact that the deed was found among the papers of the grantee after her death is some evidence at least that it had been delivered to and accepted by her; and evidence tending to prove non-delivery would simply raise a conflict in the testimony.—*Id.*
3. **ID.—ADMISSIBILITY OF EVIDENCE.**—The Court did not err in admitting the evidence of Houghton (stated below). It tended to prove a motive for the making of the deed, and was admissible under the issues being tried. *Id.*
4. **ID.—ID.**—No question concerning the will of M. K. was involved in this case, and it was not error to exclude evidence as to its existence or destruction.—*Id.*
5. **ID.—ID.—DELIVERY—RES GESTÆ.**—Evidence of the acts and declarations of the grantee in regard to the deed while it was in her actual possession were admissible upon the question of her acceptance of it.—*Id.*
6. **ID.—ID.—HEARSAY—INSANITY.**—It was not error to exclude evidence of the declarations of M. K. as to what was done or said by her husband some time after the execution of the deed.—*Id.*, 415.

See **RIGHT OF WAY**, 1, 2; **UNRECORDED DEED**, 1, 2.

DEED OF TRUST.

DEED OF TRUST—FORECLOSURE—MORTGAGE—INJUNCTION.—Appeal from an order refusing to enjoin a sale under a deed of trust affirmed on authority of *Grant v. Burr*, 54 Cal. 298, and *Bateman v. Burr*, 57 id. 480.—*Durkin v. Burr*, 360.

DEED, CONSTRUCTION OF.

1. **CONSTRUCTION OF DEED—DESCRIPTION OF LAND.**—P. the owner of an undivided tenth part of a tract of land executed to S. a deed containing

DEED, CONSTRUCTION OF (Continued).

the following description of the property conveyed: "All of the grantor's right, title, and interest in the following described property, viz.: One half interest in that right, title and interest of the party of the first part in and to an undivided one tenth part of that certain tract or parcel of land," etc. S. executed a deed to T. containing the following description: "All his right, title, interest, etc., in the following property, to wit: One half interest in that right, title and interest of the party of the first part in and to an undivided one tenth part of that certain tract or parcel of land," etc.

Held: The latter deed conveyed an undivided one half only of the interest of S.—that is to say an undivided one fortieth of the land.—*Hayes v. Wetherbee*, 396.

2. *Id.*—*Id.*—It is a principle in the construction of releases, and the reason of the rule extends to grants and conveyances of land, that a release in general words shall be restrained to the particular occasion; and that where there are general words alone in a deed of release, they shall be taken most strongly against the releasor; but when there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the particular recital.—*Id.*

DEFAULT. See **AMENDMENT**, 6, 7; **DEFECTS CURED BY**.

DEFECTS CURED BY VERDICT OR DEFAULT. See **FORECLOSURE**, 5.

DEFINITIONS. See **CITY**; **CONNECTIONS**; **FINAL DISTRIBUTION**; **HYPOTHESES**; **PERSON**; **PROPERTY**; **STREETS**; **TAX**.

DELEGATION OF LEGISLATIVE POWER. See **TAXATION**, 17.

DELIVERY. See **DEED**, 2, 5.

DEMAND FOR RENT. See **UNLAWFUL DETAINER**, 1.

DEMURRER.

1. **DEMURRER—COMPLAINT—CAPACITY TO SUE.**—The objection that it does not appear from the complaint, that the plaintiff was ever duly created a swamp and overflowed land district, goes to the legal capacity of the plaintiff to sue, and not to the sufficiency of the facts stated to constitute a cause of action.—*Swamp and Overflowed Land District No. 110 v. Feck*, 403.
2. *Id.*—*Id.*—*Id.*—**ANSWER.**—It is not a good ground of demurrer that it does not appear in the complaint that the plaintiff had the legal capacity to sue. The omission can only be taken advantage of by answer.—*Id.*

See **DISCRETION OF COURT**.

DESCRIPTION. See **DEED, CONSTRUCTION OF**, 1, 2.

DIAGRAM. See **STREET ASSESSMENT**, 2.

DISCRETION OF COURT.

DISCRETION OF COURT IN SETTING ASIDE JUDGMENT—MISTAKE—AMENDMENT TO COMPLAINT—PROMISSORY NOTE—DEMURRER.—In an action to foreclose a mortgage the Court below set aside a judgment against the plaintiff entered upon a demurrer to the complaint, and permitted the plaintiff to file an amendment to his complaint setting up a mistake in drawing up the note sued upon.

Held: Assuming that the Court may in a proper case grant relief against a final judgment on demurrer, the circumstances attending the case in hand did not justify such action.—*Weisenborn v. Neumann*, 376.

See **AMENDMENT**, 1-5; **INJUNCTION**; **JUDGMENT**, **MOTION TO SET ASIDE**, 2; **SUPPLEMENTAL ANSWER**.

DISMISSAL OF APPEAL. See **APPEAL**, 6, 11, 12.

DISMISSAL OF MOTION. See **NEW TRIAL**, 3.

DISMISSAL OF PARTIES DEFENDANT. See **PRESUMPTION**, 1, 2.

DIVERSION OF WATER, ACTION FOR. See **PLACE OF TRIAL**.

DIVORCE.

1. **DIVORCE—DIVISION OF COMMUNITY PROPERTY—POWER OF SUPREME COURT—APPEAL.**—In an action for divorce upon the grounds of extreme cruelty and adultery, the Court found for the plaintiff on the former, and against her on the latter issue; and rendered judgment granting the divorce and dividing the community property equally between the parties. Upon appeal the plaintiff claimed that she was entitled to a divorce upon both grounds, and also that she was entitled to a larger share of the community property.

Held: It is unnecessary to examine the record with reference to the charge of adultery, as it is competent for the Court to give the plaintiff all the relief under a finding of extreme cruelty that it could give under findings against the defendant upon both charges. The Court erred in not awarding to the plaintiff a larger share of the community property. Case accordingly remanded with instructions to the Court below to modify its decree so as to award to the plaintiff three fourths of the community property.—*Brown v. Brown*, 579.

2. **Id.—Id.—Id.**—Under § 148, C. C., this Court has the power to modify the judgment of the Court below in an action for divorce with respect to the distribution of the community property.—*Id.*

DOCKAGE. See **HARBOR COMMISSIONERS**, 5-8.

DOUBLE TAXATION. See **TAXATION**, 14.

DUPLICITY. See **CHILD-STEALING**, 1, 2.

EJECTMENT.

1. **EJECTMENT—OUTSIDE LANDS OF SAN FRANCISCO—ORDER NO. 866 OF THE BOARD OF SUPERVISORS.**—Ejectment for land forming part of the "out-

EJECTMENT (Continued).

side lands" of San Francisco. (Complaint filed Sept. 16, 1873.) The plaintiff deraigned title under deed from the City and County of San Francisco—dated April 5, 1870—issued in pursuance of proceedings taken under Order No. 866 prior to the passage of the Act of April 14, 1870, "to expedite the settlement of land titles in the City and County of San Francisco." (Stat. 1869-70, 353.)

Held: In effect, Order 866 was ratified and re-enacted by the Act referred to. The deeds under which the plaintiff claims were therefore valid. *Rousset v. Reay*, 328.

2. ID.—FINDINGS—POSSESSION OF DEFENDANT.—The finding of the Court of possession by the defendants was justified by the evidence.—*Id.*
3. ID.—ID.—STATUTE OF LIMITATIONS—PLEADING.—The defendants pleaded that the plaintiff's cause of action was barred by § 318 and by § 319 of the Code of Civil Procedure, and the Court found "that the plaintiff was and has been at all times since the sixth of April, 1870, seised in fee simple, and the owner of and entitled to the possession of" the lands in controversy; and "that the said defendants had prior to the commencement of this action been in the possession of the said pieces and parcels of land at no time prior to the nineteenth of May, 1870."

Held: If there was a plea of the statute of limitations the finding covered it.—*Id.*

4. EJECTMENT—PLEADING—FINDING—SEISIN—OUSTER—TIME.—In ejectment the complaint averred seisin in fee on the first day of June, 1879, and an ouster on the same day; and it was found by the Court that the plaintiff was owner in fee of the land in controversy, on the twenty-ninth of June, 1868, and conveyed the same to M. K. on the sixteenth of November, 1875; that M. K. died testate in May, 1879; that his executor leased to the defendant in August of the same year, and that defendant had continued to occupy the premises ever since. It was objected that there was no finding on the issue of ownership on the first day of June, 1879, the date of the seisin alleged in the complaint. *Held:* The findings cover all the material issues.—*Kidder v. Stevens*, 414.
5. ID.—ID.—ID.—ID.—ID.—ID.—PRESUMPTION OF LAW.—A presumption of law that is disputable when not changed by evidence becomes to the Court a rule indisputable for the case, and the Court is bound to apply it. *Id.*
6. ID.—ID.—ID.—ID.—ID.—ID.—A status once established is presumed by the law to remain until the contrary appears.—*Id.*
7. ID.—ID.—ID.—ID.—ID.—ID.—IMMATERIAL ALLEGATION.—The allegation of time as to seisin or ouster in our so called action of ejectment, is not material, and a denial of it raises no material issue except when the mesne profits are in question.—*Id.*
8. EJECTMENT—MEXICAN GRANT—SURVEY UNDER THE ACT OF JUNE 14, 1860—FINAL CONFIRMATION—APPEAL—PRESUMPTION—JURISDICTION OF UNITED STATES DISTRICT COURT—STATUTE OF LIMITATIONS—PATENT—PRE-EMPTION.—In an action of ejectment, the facts as found by the Court were in substance as follows: The land in controversy is within the limits of a Mexican grant to the predecessors in title of the plaintiff, approved by the Departmental Assembly, and of which the juridical

EJECTMENT (Continued).

possession has been delivered. The claim was duly presented and confirmed by the Land Commissioner and the United States District Court. An appeal was taken to the Supreme Court, but afterwards (in the year 1857), the District Court made an order dismissing the same. In the year 1858, the grant was surveyed by the United States Surveyor General, so as to include the premises in controversy; but in 1861, the survey not having been previously approved, the Surveyor General altered the northern boundary of the survey, so as to exclude it. The survey so corrected was approved, and advertised in accordance with the provisions of the Act of June 14, 1860; and no objection was made to the survey until the sixteenth day of June, 1869, when it was again advertised under the provisions of the Act of July 2, 1864; and objections were made by the owners of the grant, which were still pending, when the suit was brought. The defendant P. entered upon the land in controversy on the ninth day of January, 1860, and has since held the adverse possession. On January 10, 1868, a patent issued to one Henry P., as a pre-emptor, for a portion of the land, who conveyed the same to the defendant P.; to whom also, on May 2, 1870, a patent issued for the balance of the land. The action was commenced on the fifteenth day of April, 1868.

Held: 1. The case does not show that the claim to the ranch in question has been finally confirmed by the authorities of the United States. The order of the District Court dismissing the appeal was absolutely void, if the appeal to the Supreme Court was pending when the order was made, and the conclusive presumption is that the appeal is still pending, in the absence of a direct finding to the contrary; 2. The action having been commenced at a date less than five years after the passage of the Act of April 18, 1863, the plaintiff is not bound by the statute of limitations. *Younger v. Page*, 517.

9. **EJECTMENT—EXECUTION—ADVERSE HOLDERS—PARTIES.**—Upon an appeal from an order staying the execution of a writ of possession upon a judgment in ejectment, it appeared, so far as the same related to a tract of land in possession of J. C. and D. C., that the parties named at and before the commencement of the action were in exclusive possession of the land in controversy and that they were made parties to the action; but that the suit as to them was afterwards dismissed.

Held: They were not affected by the judgment, and the order should be affirmed.—*McLeran v. McNamara*, 610.

See **ESTOPPEL**, 2; **NEW TRIAL**, 2; **PRIOR POSSESSION**, 1, 2; **PUBLIC NUISANCE**, 2.

EMBEZZLEMENT.

EMBEZZLEMENT OF SHARES OF STOCK—PROPERTY, DEFINITION OF.—Shares of stock constitute property, and are therefore the subject of embezzlement.—*People v. Williams*, 1.

EQUAL PROTECTION OF THE LAWS. See **TAXATION**, 5.

EQUALIZATION OF ASSESSMENT ROLL. See **TAXATION**, 3, 4, 13.

EQUITY. See SURETIES, 1, 2, 3.

ESTATES OF DECEASED PERSONS.

1. **ESTATES OF DECEASED PERSONS—FINAL DISTRIBUTION—DEFINITION—PENDENCY OF ADMINISTRATION—CLAIMS AGAINST ESTATE—STATUTE OF LIMITATIONS.**—Until the entry of a decree discharging the executor or administrator, the administration of the estate is still pending, and until then (under C. C. P. § 1569) no claim against the estate which has been presented and allowed is effected by the statute of limitations.—*Dohs v. Dohs*, 255.
2. **ESTATES OF DECEASED PERSONS—PROCEEDING FOR SALE OF REAL ESTATE—STATUTE OF LIMITATIONS.**—On the tenth day of April, 1878, an order for the sale of real estate was duly made by the Probate Court; but the property was not sold. On the eleventh day of April, 1881, the administrator filed another petition for the sale of the same property referring to the former order and stating that no sale had been made. An opposition was filed by the heirs on the ground that more than four years had elapsed after the claims (except three) were allowed before the filing of the petition; and that the application was barred by § 343 C. C. P.

Held: It is unnecessary in this case to decide the point suggested. The proceedings for subjecting property to sale for the payment of debts were commenced upon the filing of the first petition. There has been no revocation of the order made thereon; there is no statute requiring the sale to be made within any given time after the order, and the petition filed on this application, and the orders made thereon may be considered as in effect a continuation of the first application and of the proceeding then instituted.—*Estate of Montgomery*, 645.

3. **ID.—ID.**—Under the Code there is no privity in the sale of property for the payment of debts as between real and personal.—*Id.*

See FAMILY ALLOWANCE, 1.

ESTIMATE OF WORK. See SWAMP LAND ASSESSMENT, 3, 4.

ESTOPPEL.

1. **ESTOPPEL—RES ADJUDICATA—PARTITION—SUPPLEMENTAL ANSWER.**—In an action of partition the Court below found that the plaintiffs were tenants in common with the defendants, but rendered judgment for the latter on the ground that they were in the adverse possession of the land at the time the suit was commenced; but the judgment was reversed in this court, and the cause remanded with directions to make partition. Intermediate the judgment of the lower court and the reversal the defendants recovered judgment in an action of ejectment for the same land brought by the plaintiffs against them.

Held: The judgment subsequently recovered can be pleaded in the partition suit.—*Martin v. Walker*, 91.

2. **ESTOPPEL BY JUDGMENT—EVIDENCE—EJECTMENT—MORTGAGE SALE—COMMISSIONER'S DEED—ATTORNEY IN FACT.**—In an action of ejectment, the plaintiff deraigned title under a commissioner's deed made in pursuance of a judgment recovered by him in an action against the defendant's grantor, commenced after the defendant's purchase and to which he was

ESTOPPEL (Continued).

not a party; and relied upon the record of that case for proof of material facts. *Held*: The defendant is not bound by the judgment.—*Hall v. Boyd*, 443.

See **STATE LANDS**, 2; **UNRECORDED DEED**, 2.

EVIDENCE. See **DEDICATION OF STREET**, 2; **ESTOPPEL**, 2; **FORCIBLE DETAINER**, 1, 2; **FORCIBLE ENTRY AND DETAINER**, 1, 2; **LARCENY**, 1, 2; **PATENT**, 2; **PLEADING**; **PUBLIC NUISANCE**, 2; **SALE**, 1; **SUFFICIENCY OF EVIDENCE**; **UNRECORDED DEED**, 1, 2.

EVIDENCE, ADMISSIBILITY OF. See **DEATH, ACTION FOR**, 3; **DEED**, 3, 4, 5, 6.

EVIDENCE, CONFLICT OF. See **DEED**, 2.

EXECUTION. See **EJECTMENT**, 9.

EXECUTION OF WRITTEN INSTRUMENT, DENIAL OF. See **PLEADING**.

FAILURE OF CONSIDERATION. See **PROMISSORY NOTE**, 1.

FAMILY ALLOWANCE.

1. **FAMILY ALLOWANCE—ESTATES OF DECEASED PERSONS—PAYMENT.**—Upon an application of the widow to the Probate Court for an order to compel the administrator to pay over to her the amount due for family allowance under an order previously made, the Court found that the whole amount of the allowance had been paid; but among the amounts found was a sum paid by the administrator in satisfaction of a bond executed by him in his private capacity to the widow—the condition of which had been broken—and a further sum expended in pursuance of an agreement with the widow for the maintenance and education of three of the children who were at school.

Held: With regard to the latter item, the payment having been made for the maintenance and education of the children at the request of the widow, was equivalent to a payment to her; but with regard to the former, the administrator has no authority to apply funds in his hands appropriated by law for the support of the family of the deceased to the payment or satisfaction of his personal obligations; nor could he legally enter into any agreement or make any arrangement with the widow for its application in that way.—*Moore v. Moore*, 526.

2. **ID.**—The family allowance is as much for the advantage of the children of deceased as for the widow, and it can not be affected by any agreement or understanding between the widow and the administrator, which would have the effect to deprive the children of it, or to divert it to any other use than that specified in the law. (MYRIOK, J., dissenting.)—*Id.*
3. **FAMILY ALLOWANCE—INSOLVENT ESTATE.**—It is the duty of the Court, after the expiration of one year from the granting of letters, to discontinue the allowance for the maintenance of the family, upon ascertaining the estate to be insolvent.—*Estate of Montgomery*, 648.

FELONY.

FELONY—INSTRUCTIONS.—*People v. Sing Lum*, 6.

FIDUCIARY. See **OVERDRAFTS**, 4.

FINAL CONFIRMATION. See **EJECTMENT**, 8.

FINAL DISTRIBUTION. See **ESTATES OF DECEASED PERSONS**, 1.

FINDINGS.

1. **FINDINGS—ADDITIONAL FINDINGS—JURISDICTION.**—The Court filed its findings July 12, 1877, and on the thirty-first of July, 1877 (prior to the entry of judgment) filed additional findings reciting that having through inadvertence failed to find upon all the issues herein—it now of its own motion made and filed the additional findings. *Held*: The additional findings were not improperly filed.—*Hayes v. Wetherbee*, 396.
2. **Id.—Id.—Id.—CASE DISTINGUISHED.**—*Baggs v. Smith*, 53 Cal. 88, distinguished.—*Id.*

See **EJECTMENT**, 2, 3, 4, 5, 6, 7; **LEASE**; **LIMITATIONS**, **STATUTE OF**, 2; **MARRIED WOMAN**; **PRIOR POSSESSION**, 1, 2; **RENT**; **REPLEVIN**, 3; **UNLAWFUL DETAINER**, 3.

FINDINGS, SUFFICIENCY OF. See **NEW TRIAL**, 2.

FINE AND IMPRISONMENT. See **MUNICIPAL ORDINANCE**, 1, 5.

FISCAL YEAR. See **TAXATION**, 10.

FORCIBLE DETAINER.

1. **FORCIBLE DETAINER—UNLAWFUL ENTRY—GOOD FAITH—EVIDENCE.**—In an action for forcible detainer, evidence is not admissible, on the part of the defendant, to show that the entry was made in good faith and under claim and color of title. Under the Code, all entries on the actual possession of another are unlawful, and the question of good or bad faith, on the part of the defendant, no longer affects the right of the recovery. *Voll v. Hollis*, 569.
2. **Id.—Id.—Id.—Id.—CASES DISTINGUISHED.**—*Thompson v. Smith*, 28 Cal. 532; *Shelby v. Houston*, 38 Id. 422, have no application under the provisions of the Code of Civil Procedure.—*Id.*

FORCIBLE ENTRY AND DETAINER.

1. **FORCIBLE ENTRY AND DETAINER—EVIDENCE.**—On the trial of an action for forcible entry and detainer, a witness for the plaintiff was asked the question: "State if anything occurred with reference to that crowd of people there, with reference to the Mayor's going on the ground and ordering them to stop?" and the Court excluded the question. *Held*: The question should have been allowed. It related to the circumstances of the entry, and was asked to show that it was forcible.—*Voll v. Hollis*, 569.

FORCIBLE ENTRY AND DETAINER (Continued).

2. *Id.*—*Id.*—The court also ruled out the following questions to a witness of the defendant: "During that time, there was a litigation pending in regard to this property between you and Mr. Voll?" "Was there not a suit brought by yourself in the Twelfth District Court to quiet title, in which you set up this very possession against Mr. Voll?"

Held: The questions were proper. They had reference to the relations between the witness and the plaintiff Voll, and were asked to show a state of feeling by witness towards Voll, as to which the questions were allowable. The Court erred in sustaining the objections.—*Id.*, 570.

FORECLOSURE.

1. **FORECLOSURE OF MECHANIC'S LIEN—LIEN—PREMATURE ACTION.**—In an action by several plaintiffs (under § 1195, C. C. P.) to foreclose separate mechanics' liens, it was alleged with reference to each cause of action that the defendant promised to pay the agreed amount "upon the completion of the building;" and also that at the time of the commencement of this action the building was not completed.

Held: There can be no foreclosure of a lien until the debt for which the lien is made and held as security has become payable.—*Harmon v. Ashmead*, 439.

2. *Id.*—**PLEADING—DEFECTS CURED BY VERDICT OR DEFAULT.**—Defects in the statement of a cause of action may be cured by failing to answer or by verdict, but not a defective cause of action.—*Id.*

3. **FORECLOSURE OF MORTGAGE—ATTORNEY'S FEE.**—Action to foreclose a mortgage which provided for payment of an attorney's fee "to become payable on filing the complaint for foreclosure." After the commencement of the suit the defendant paid the principal, interest, and Court costs but not the attorney's fee; but was informed by the plaintiff that there was an attorney's fee due which he would have to pay before the mortgage would be satisfied or the suit dismissed.

Held: The plaintiff was entitled to proceed with the action to enforce the payment of the attorney's fee.—*Stockton Savings and Loan Society v. Donnelly*, 481.

4. *Id.*—*Id.*—The cause was tried before a jury which returned a verdict for the plaintiff for one hundred and twenty-one and forty-five one hundredths dollars, on which the Court entered a decree in favor of the plaintiff for the sum mentioned.

Held: It was the province of the Court to fix the amount of the attorney's fee, but as the Court adopted as correct the amount returned by the jury, the amount may be considered as having been fixed by the Court.—*Id.*, 482.

5. **FORECLOSURE OF MORTGAGE—OPTION TO CONSIDER THE WHOLE AMOUNT DUE UPON FAILURE TO PAY INSTALLMENTS—COMPLAINT—PLEADING.**—A mortgage contained a clause to the effect that if any of the installments of principal or interest should remain unpaid for ninety days after it became due, the whole amount of the note should become due immediately at the option of the payee or holder.

Held: Upon a failure to pay any of the installments of the note according to its terms the note became due immediately at the option of the payee,

FORECLOSURE (Continued).

and it was not necessary for the payee, before commencing proceedings to enforce it for the full amount, to announce his option to the maker by notice in writing that he elected to consider the whole amount of the note as due; it was sufficient if he made his election, and demanded payment of the whole amount before the commencement of the action.—*Leonard v. Tyler*, 299.

See **DEED OF TRUST; LIMITATIONS, STATUTE OF; MORTGAGE.**

FRANCHISE. See **TAXATION**, 21.

FRAUD. See **PROMISSORY NOTE**, 1.

FRAUD AS TO CREDITORS. See **REFLEVIN**, 2, 3.

FRIVOLOUS APPEAL.

DAMAGES FOR FRIVOLOUS APPEAL.—*Van Slyke v. Miller*, 411.

GOOD FAITH. See **FORCIBLE DETAINER**, 1, 2.

GUARANTY.

GUARANTY—CONSTRUCTION OF CONTRACT.—The defendant executed to the plaintiff two guaranties, one in the words and figures following, and the other similar except in the name of the debtor. "I do hereby guarantee the payment of this bill against P. * * * (provided said P. acknowledges the amount herein as correct) payment to be made out of the proceeds of his crop for the season of 1876, on or before October 1, 1876.

Held: The guaranties sued upon are conditional. The obligation assumed by the guarantor did not extend beyond the amount which should be by him received from the crop clear of incidental expenses. It was for the plaintiff to establish that the condition had happened which made the defendant liable.—*Cereghino v. Hammer*, 235.

HABEAS CORPUS. See **BATTERY; CONTEMPT.**

HARBOR COMMISSIONERS.

1. **HARBOR COMMISSIONERS—WHARFAGE—STREET.**—The Harbor Commissioners have no authority to collect wharfage for merchandise landed at a wharf constituting no portion of a street.—*People v. Pacific Rolling Mills Company*, 323.
2. **Id.—Id.—Id.**—Section 2 of the Act of March 28, 1868 (Stat. 1867-8, p. 432) can not be construed to mean that the owner shall be compelled to collect wharfage from himself for the use of his own wharf, and hold the amount thus collected as agent of the Harbor Commissioners.—*Id.*
3. **Id.—Id.—Id.**—The provision of the fourth section of the Act of March 30, 1868 (Stats. 1867-8, p. 716), that "nothing in this Act shall be construed to interfere with the collection of dockage and wharfage by the State," is no new grant of power to the Harbor Commissioners. It is simply a precautionary reservation that nothing contained in the Act

HARBOR COMMISSIONERS (Continued).

shall be construed to interfere with the powers of the Harbor Commissioners with respect to collections, as the same are already conferred and defined.—*Id.*

4. **ID.—ID.—ID.—TONNAGE—CONSTITUTIONAL LAW.**—(MYRICK, J., concurring.) Whenever the State shall have constructed or acquired wharves in the interest of commerce it may collect wharfage as proprietor for the use of the wharves. To attempt to impose "wharfage" (so-called) in advance of such construction or acquisition would be an attempt to lay a duty on tonnage in violation of Article One, Section Ten, Constitution of the United States.—*Id.*
5. **HARBOR COMMISSIONERS—DOCKAGE—WHARFAGE—TOLLS—STREETS.**—The State Board of Harbor Commissioners has no authority to collect dockage, wharfage or tolls upon any wharves that do not constitute a portion of a street, ending or fronting upon the waters of the bay.—*People San Francisco Gaslight Company*, 349.
6. **ID.—ID.—ID.—ID.—ID.—DEFINITION.**—Section 2524, Pol. C., refers to "streets" which are "thoroughfares," and not to streets covered by water. *Id.*
7. **HARBOR COMMISSIONERS—DOCKAGE—WHARVES—STREETS.**—The State Harbor Commissioners have no power to collect dockage upon vessels lying at the Potrero Gas Works' wharf.—*Id.*, 351.
8. **HARBOR COMMISSIONERS—DOCKAGE—WHARFAGE—TOLLS—STREETS—DEFINITION.**—Affirmed upon authority of *The People v. The San Francisco Gas Co.*, 60 Cal. 349.—*Soule v. Pope*, 567.

HEARSAY. See **DEED**, 6.

HEIR, LIABILITY OF, ON COVENANT OF ANCESTOR. See **RIGHT OF WAY**, 1, 2.

HOLDING OVER. See **RENT**.

IDENTIFICATION OF PAPERS. See **APPEAL**, 8, 9.

ILLEGAL CONSIDERATION. See **LEASE; UNDERTAKING ON ATTACHMENT**, 3.

IMMATERIAL ALLEGATION. See **EJECTMENT**, 7.

IMMATERIAL ERROR. See **OVERDRAFTS**, 2.

IMMATERIAL FINDING. See **PRIOR POSSESSION**, 2.

IMPEACHMENT OF WITNESS.

IMPEACHMENT OF WITNESS—LEADING QUESTION.—Where a witness has been asked, on cross-examination, if he had not used particular expressions for the purpose of laying a foundation for contradicting him, and has denied that he has done so, the witness called to contradict him may be asked if he did not make the particular statement in question.—*People v. Lee Ah Yute*, 95.

INDICTMENT.

1. **INDICTMENT—MISDEMEANOR—MISCONDUCT IN OFFICE—NEW CITY HALL COMMISSIONERS—APPEAL—JURISDICTION OF SUPREME COURT.**—The defendants, as New City Hall Commissioners for the City and County of San Francisco, were indicted for misconduct in office: *Held*, This Court has jurisdiction of the appeal.—*People v. Kalloch*, 113.
2. **Id.—Id.—Id.—Id.**—*Held further*, The indictment is fatally defective. *Id.*
3. **INDICTMENT.—MISCONDUCT IN OFFICE.**—The indictment in effect charged the defendant, who was Mayor of the City and County of San Francisco, with having corruptly received from a city official a part of his salary, which salary had been increased by the influence of defendant; but did not charge him with having received any reward or promise thereof as an inducement to his official action.
Held: The act charged did not constitute a violation of Section 70 of the Penal Code.—*Id.*, 116.

INFORMATION. See **CHILD-STEALING**, 1, 2.

INJUNCTION.

INJUNCTION—DISCRETION—APPEAL.—The continuance or dissolution of an injunction to prevent a sale of property, pending an action between the parties to determine the right to the property, is a matter within the sound discretion of the Court that issues the injunction, and this Court will not interfere with the exercise of that discretion, except in a case of palpable error or abuse of discretion.—*White v. Nunan*, 406.

See **DEDICATION OF STREET**, 1; **DEED OF TRUST**.

INSANITY. See **DEED**, 6.

INSOLVENCY PROCEEDINGS. See **RECEIVER**.

INSOLVENT ESTATE. See **FAMILY ALLOWANCE**, 3.

INSTALLMENTS. See **OPTION TO CONSIDER WHOLE AMOUNT DUE UPON FAILURE TO PAY**.

INSTRUCTIONS. See **ASSAULT WITH DEADLY WEAPON**, 2, 3; **ATTEMPT TO COMMIT ROBBERY**; **DEATH, ACTION FOR**, 1; **FELONY**; **JUSTIFIABLE HOMICIDE**, 1, 2; **LARCENY**, 1, 2; **MINING LAW**; **MURDER**; **OVERDRAFTS**, 1, 2, 5; **ROBBERY**, 2, 3, 4; **SELF-DEFENSE**, 1-4; **WITNESS, CREDIBILITY OF**.

INTEREST. See **NATIONAL BANK**; **PROMISSORY NOTE**, 3, 4.

ISSUES. See **MURDER**, 1; **PLEADING**.

JOINDER OF ACTIONS. See **SWAMP LAND ASSESSMENT**, 1.

JOINDER OF PARTIES. See **PARTIES**.

JUDGE AT CHAMBERS, POWER OF. See RECEIVER.

JUDGMENT.

JUDGMENT—PLEADING.—In pleading a judgment, it is sufficient to allege that the same remains unpaid and in full force. It is unnecessary to allege that the judgment was never appealed from.—*Chaquette v. Ortel*, 594.

See APPEAL, 6, 7; DISCRETION OF COURT; ESTOPPEL, 2; MUNICIPAL ORDINANCE, 1, 5; STATE LANDS, 1; SURETIES, 3.

JUDGMENT BY DEFAULT.

1. **JUDGMENT BY DEFAULT—AFFIDAVIT OF SERVICE OF SUMMONS.**—An affidavit of service of summons by a person other than the Sheriff, which fails to state that he was over eighteen years of age at the time of service, is insufficient to prove service or to sustain a judgment by default.—*Howard v. Galloway*, 10.
2. **ID.—APPEAL—PRACTICE.**—The defendant has a right to appeal from a judgment by default without moving to set aside the default or otherwise proceeding in the Court below.—*Id.*
3. **ID.—ID.—ID.—CASES OVERRULED.**—*Guy v. Ide*, 6 Cal. 99, and the cases following it were virtually overruled in *Halleck v. Jaudin*, 34 Id. 172.—*Id.*
See SERVICE OF SUMMONS, 1.

JUDGMENT FOR PAYMENT OF FINE.

1. **JUDGMENT FOR PAYMENT OF FINE—MISDEMEANOR—PUNISHMENT—SUNDAY LAW.**—Upon a conviction for keeping open a place of business on Sunday, the judgment was "that the defendant pay a fine of fifty dollars, or be imprisoned in the County Jail * * * for the period of fifty days."
Held: As to the imprisonment of the defendant, the judgment is void, and affords no authority to any officer to hold him in custody.—*Ex parte Baldwin*, 432.
2. **ID.—ID.**—The power of a Justice to impose imprisonment upon a defendant convicted of a misdemeanor, punishable only by fine is derived from § 1446, Penal Code, and can be exercised only in accordance with its provisions.—*Id.*
3. **ID.—CASES DISTINGUISHED.**—*Ex parte Kelly*, 28 Cal. 414; *Ex parte Chin Yan*, 8 P. C. L. J. 1113, and *Ex parte Ellis*, 54 Id. 204, distinguished.—*Id.*

JUDGMENT, MOTION TO SET ASIDE.

1. **MOTION TO SET ASIDE JUDGMENT—WAIVER OF JURY TRIAL—CALENDAR OF COURT.**—A case for goods sold and delivered, was, on motion of plaintiff's attorney, put upon the equity calendar in the absence and without the knowledge of the defendant, and in consequence the case was tried without his presence, and judgment rendered for the plaintiffs for the full amount claimed. A motion of the defendant to set aside the judgment was subsequently denied by the Court for the reason that the notice of the motion did not specify the grounds upon which it would be made.
Held: The failure of the defendant to appear when the case was called on the equity calendar did not operate as a waiver of a jury for the reason that the case was improperly there.—*Sweeney v. Stanford*, 362.

JUDGMENT, MOTION TO SET ASIDE (Continued).

2. **Id.—Id.—Id.—NOTICE OF MOTION—AMENDMENT—DISCRETION OF COURT.** Assuming that the motion was properly denied on the ground stated, it was the duty of the Court to allow defendant's motion for leave to amend his notice so as to make it conform to the rule of the Court. The Code is very liberal on the subject of amendments, and the recent decisions of this Court have been in full accord with the spirit of the Code.—*Id.*

JUDGMENT ON THE PLEADINGS. See PUBLIC NUISANCE, 1.

JUDGMENT, PRESUMPTION IN FAVOR OF. See JURISDICTION, 2, 3; PRESUMPTIONS, 1, 2.

JUDGMENT, REVERSAL OF. See APPEAL, 5.

JUDGMENT, SATISFACTION OF. See UNDERTAKING ON APPEAL, 2.

JUDICIAL NOTICE. See RULES OF COURT.

JURISDICTION.

1. **JURISDICTION—MISDEMEANOR—PETIT LARCENY—SUPERIOR COURT—JUSTICE'S COURT—CONSTITUTIONAL LAW.**—The Superior Court has no jurisdiction of cases of petit larceny, or such other misdemeanors, as have been committed by the Legislature to the Justice's Court.—*Ex parte Wallingford*, 103.
2. **JURISDICTION—PRESUMPTION IN FAVOR OF JUDGMENT—CERTIORARI—CONTEMPT—TRIAL.**—Upon an application for a writ of *certiorari* to review a judgment for contempt of Court, the record sought to be reviewed consisted of the affidavits of the facts constituting the contempt, the answer of the party charged, and the judgment for contempt; the last of which stated that the matter had been regularly heard; and it was contended that witnesses should have been examined in the court below. *Held*: It does not appear that this course was not pursued.—*Roe v. The Superior Court of the City and County of San Francisco*, 93.
3. **Id.—Id.—Id.—CORRECTION OF RECORD.**—When jurisdiction is once had of the subject-matter in person, every intendment must be made to support the judgment. If the record is incorrect, it must be corrected by motion, or suggestion to the court below.—*Id.*
4. **JURISDICTION—SUPERIOR COURT—SUNDAY LAW—MISDEMEANOR.**—The Superior Court has no jurisdiction of an indictment for the violation of § 300 Penal Code.—*Gafford v. Bush*, 149.
5. **Id.—Id.—Id.—Id.—JUSTICE'S COURT.**—By virtue of power vested in the Legislature by § 11, Art. vi. Const., that department of the Government by § 115 C. C. as amended April 1, 1880, gave to Justice's Court jurisdiction of "all misdemeanors punishable by fine not exceeding five hundred dollars or imprisonment not exceeding six months or by both such fine and imprisonment."—*Id.*
6. **JURISDICTION OF JUSTICE'S COURT AND OF SUPREME COURT ON APPEAL—ACTION FOR THE CONVERSION OF PERSONAL PROPERTY—CONSTITUTIONAL LAW.**—In an action in a Justice's Court for the conversion of per-

JURISDICTION (Continued).

sonal property the complaint alleged the property to be of the value of two hundred and fifty dollars, and that plaintiff had sustained damages in the further amount of fifty dollars; and demanded judgment for two hundred and ninety-nine dollars and costs. Judgment was entered accordingly, and the defendant, after having appealed to the Superior Court, applied to this Court for a writ of prohibition.

Held: The Justice's Court had jurisdiction were it otherwise, and the Superior Court would have jurisdiction of the appeal.—*Sanborn v. Superior Court of Contra Costa County*, 425.

7. JURISDICTION OF MUNICIPAL COURT OF APPEALS—TRANSFER OF CASES FROM COUNTY COURT—ORDER *NUNC PRO TUNC*—SERVICE OF NOTICE OF APPEAL—JUSTICE'S COURT.—Appeal from judgment of affirmance (upon certiorari) of a judgment of the late Municipal Court of Appeals of the City and County of San Francisco, rendered upon an appeal purporting to have been taken by the defendant in the action to the County Court from a judgment of the Justice's Court of said City and County. Judgment was rendered in the Municipal Court October 15, 1879, but there was no order made by the County Court transferring the case until November 17, 1879, when an order of transfer was made, and ordered to be entered *nunc pro tunc*. There was no evidence in the record of service of the notice of appeal, or of a waiver thereof.

Held: The order of transfer made subsequently to the rendition of the judgment and entered *nunc pro tunc*, was wholly ineffectual to confer a jurisdiction on the Court which it had not at the time it attempted to exercise it.

Held, further: Without service of notice, the appeal was ineffectual, and the appellate Court acquired no jurisdiction of the case.—*Trobock v. Caro*, 301.

8. JURISDICTION OF THE MUNICIPAL COURT OF APPEALS OF SAN FRANCISCO—TRANSFER OF CASE FROM COUNTY COURT—RETURN TO WRIT OF CERTIORARI—RECORD.—The Municipal Court of Appeals could not acquire jurisdiction of a case except by transfer from the County Court.—*Descalso v. Municipal Court of Appeals of the City and County of San Francisco*, 296.
9. *ID.*—*ID.*—APPEARANCE.—In the absence of such transfer the voluntary appearance of the defendant could not confer jurisdiction.—*Id.*
10. JURISDICTION OF THE SUPERIOR COURT—APPEAL FROM JUSTICE'S COURT—CONSTITUTIONAL LAW.—Under the Constitution and prior to any act of the Legislature relating to appeals from Justices' Courts, the Superior Court had jurisdiction of such appeals.—*California Fruit and Meat Shipping Company v. Superior Court*, 305.
11. JURISDICTION OF SUPREME COURT—CONSTITUTIONAL LAW—TRESPASS.—In an action for trespass on land in which the title of the plaintiff to the *locus in quo* was admitted, the amount alleged as damages and demanded in the prayer of the complaint was nine hundred dollars, and the verdict and judgment were for two hundred dollars.
Held: This Court has appellate jurisdiction of the case. (MORRISON, C. J., dissenting.)—*Dashiell v. Slingerland*, 653.
12. *ID.*—*ID.*—JURISDICTION OF SUPERIOR COURT.—The settled rule is that the amount sued for exclusive of interest is the test of jurisdiction in this

JURISDICTION (Continued).

Court (as also in the Superior Court) in all cases where actions are brought to recover money. [MORRISON, C. J., dissenting.]-*Id.*

13. *Id.*-*Id.*-*Id.*-CASES DISTINGUISHED: *Gordon v. Ross*, 2 Cal. 156; *Doyle v. Seawall*, 12 id. 280; *Votan v. Reese*, 20 id. 90; *Dunphy v. Guindon*, 13 id. 28; *Zabriskie v. Torrey*, 20 id. 173; *Meeker v. Harris*, 23 id. 286; *Melson v. Melson*, 2 Muni. 542; *Tipton v. Chambers*, 1 Metc. 565; *Walker v. U. S.*, 4 Wall. 163; distinguished.-*Id.*

See ALIMONY PENDING APPEAL, 1, 2; APPEAL, 4; CONTEMPT; FINDINGS, 1, 2; INDICTMENT, 1; STATE LANDS, 1, 2; STATE PATENT; TERRITORIAL JURISDICTION OF THE STATE, 1, 2; UNITED STATES DISTRICT COURT.

JURY TRIAL. See JUDGMENT, MOTION TO SET ASIDE, 1, 2.

JUSTICE'S COURT. See JURISDICTION, 1, 5-7, 10.

JUSTIFIABLE HOMICIDE.

1. JUSTIFIABLE HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.—The Court instructed the jury as follows: "If you believe beyond a reasonable doubt, from the evidence, that the defendant killed the deceased, then, to render said killing justifiable, it must appear that defendant was wholly without fault imputable to him by law, in bringing about or commencing the difficulty in which the mortal wound was given.

Held: Even if the defendant had been the assailant, if he had really and in good faith endeavored to decline any further struggle before the homicide was committed, the killing might be justifiable in self-defense.—*People v. Simons*, 72.

2. *Id.*-*Id.*-CONFLICTING INSTRUCTIONS.-*Id.*

LAND OFFICERS. See PATENT, 2; STATE PATENT.

LANDLORD AND TENANT. See UNLAWFUL DETAINER, 1.

LARCENY.

1. LARCENY.—CIRCUMSTANTIAL EVIDENCE.—INSTRUCTION.—On the trial the Court gave the jury the following instruction: "There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct or positive testimony of an eye-witness to the commission of the crime, and the other is proof by testimony of a chain of circumstances pointing sufficiently strong to the commission of the crime by the defendant, and which is known as circumstantial evidence. Such evidence may consist of admissions by the defendant, plans laid for the commission of the crime, such as putting himself in position to commit it; in short, any acts, declarations, or circumstances admitted in evidence tending to connect the defendant with the commission of the crime. There is nothing in the nature of circumstantial evidence that renders it any less reliable than other classes of evidence. A man may as well swear falsely to an absolute knowledge of the facts as to a number of facts from which, if

LARCENY (Continued).

true, the facts on which the guilt or innocence depends, must inevitably follow.

"No human testimony is superior to possible doubt, and all that is required, if under the foregoing rules the testimony is sufficient to convince you as reasonable men to a moral certainty and beyond a reasonable doubt, that the defendant committed the act charged in the information, then I charge you it is your duty to convict."

And it was claimed that the foregoing instruction was erroneous, because, in the very nature of things, there is an inherent difference between direct and positive evidence, and circumstantial evidence.

Held: The instruction contained a correct statement of the law and was free from legal exception.—*People v. Morrow*, 142.

2. **ID.—CREDIBILITY OF WITNESS TESTIFYING IN HIS OWN BEHALF.—WEIGHT OF EVIDENCE.—INSTRUCTION.**—The Court instructed the jury as follows: "The defendant has offered himself as a witness, on his own behalf, on this trial, and in considering the weight and effect to be given his evidence, in addition to noticing his manner and probability of his statements, taken in connection with the evidence in the cause, you should consider his relations and situation under which he gives his testimony, the consequences to him relating from the results of this trial and the inducements and stipulations which would ordinarily influence a person in his situation. You should carefully determine the amount of credibility to which his evidence is entitled, if convincing and carrying with it a belief in its truth, to act upon it; if not, you have a right to reject it."

Held: The defendant, in a criminal case, testifying in his own behalf, occupies a relation to the case different from that occupied by any other witness. It is only by virtue of a provision of the Code that he is permitted to testify at all, and it is manifest that he labors under the strongest temptation to which any witness could be subjected. It is not error, therefore, for the Court to call the attention of the jury to that circumstance, and we see no error in the instruction complained of. (SHARPSTEIN and MCKEE, JJ. dissenting.)—*Id.*

3. **LARCENY—VARIANCE AS TO OWNERSHIP OF PROPERTY—NAME.**—The appellants were convicted of the crime of grand larceny, for stealing a horse and wagon, the alleged property of one Sang Hop. On the trial of the case the owner of the property stolen testified that he had two names—a business name and a personal one. His personal name was Yup Chin, and his business name Sang Hop; and that in all his business transactions and dealings, for years, he has been known by his business name only.

Held: The name of the owner of property stolen is not a material part of the offense charged. It is only required to identify the transaction, so that the defendant, by proper plea, may protect himself against another prosecution for the same offense. The owner may have a name by reputation, and if it is proved that he is better known by that name than any other, the charge in the information by that name is sufficient.—*People v. Leong Quong*, 107.

See POSSESSION OF STOLEN PROPERTY, 1, 2, 3, 4.

LEADING QUESTION. See IMPEACHMENT OF WITNESS.

LEASE.

LEASE—ILLEGAL CONSIDERATION—FINDING.—In an action for rent, the defendant pleaded that the premises were let to him for the purpose of being used as houses of prostitution, with the knowledge and consent of the plaintiff, but the Court found to the contrary. *Held:* The evidence sustains the finding.—*Trobock v. Caro*, 304.

LEGAL CONCLUSIONS. See **PATENT**, 2.

LICENSE TAXES.

1. **LICENSE TAXES—CONSTITUTIONAL LAW—TAX—DEFINITION.**—The license fees imposed by the Political Code were imposed mainly, if not solely, for purposes of revenue and are therefore in effect *taxes* within the meaning of that term as used in §12 Art. xi. of the Constitution. (McKEE, J. dissenting.)—*People v. Martin*, 153.
2. **ID.—ID.—REPEAL OF STATUTE.**—Such license taxes being imposed for county purposes are in contravention of the section above referred to and the sections of the Political Code imposing the same are therefore no longer in force. (McKEE, J., dissenting.)—*Id.*

LIEN. See **FORECLOSURE**, 1.

LIMITATION ON RATE OF INTEREST. See **NATIONAL BANK**.

LIMITATIONS, STATUTE OF.

1. **STATUTE OF LIMITATIONS—MORTGAGE REDEMPTION—FORECLOSURE.**—Where a deed absolute in form is executed as a mortgage to secure a debt, the right to redeem and the right to foreclose are reciprocal, and when one is barred by the statute of limitations, the other is equally barred.—*Taylor v. McClain*, 651.
2. **STATUTE OF LIMITATIONS—ADVERSE POSSESSION—FINDINGS—PROBATIVE FACTS—PRESUMPTION OF LAW.**—In an action of ejectment commenced Sept. 22, 1880, in which the defendant pleaded the Statute of Limitations, as to a portion of the land in controversy, the Court found, upon that issue, in effect, that the defendant purchased from a tenant at sufferance of the plaintiffs, and entered into possession of a house standing upon the land in question, but that he did not claim or hold the land adversely to the plaintiffs until about the first day of March, 1878; and it was objected that the finding did not cover the issue as to the statute. *Held:* From these probative facts the ultimate fact results that the cause of action was not barred by the statute. The finding therefore covered the issue.—*Osborne v. Clark*, 622.

See **EJECTMENT**, 3, 8; **ESTATES OF DECEASED PERSONS**, 1, 2; **PATENT**, 1.

LIQUIDATED DAMAGES. See **SALE**, 3.

LOCAL OR SPECIAL LAW. See **TAXATION**, 6.

LOCAL REGULATIONS. See **MINING LAW**.

MARINE INSURANCE.

1. **MARINE INSURANCE—CHANGE OF SHIP—TRANSHIPMENT OF CARGO.**—It is an implied condition of a policy of marine insurance that the ship named in it shall not, after the commencement of the risk, be changed without necessity or the consent of the underwriters; for such unnecessary or unsanctioned change of the ship would produce an alteration of the risk run by the underwriters, and therefore exempt them from their liability. *Schroeder v. Schweizer Lloyd Transport Versicherungs Gesellschaft*, 467.
2. **ID.—ID.—ID.—CONNECTIONS.**—Plaintiff's wheat was insured by the defendant on the steamer *Colorado* and connections. The customs and usage of the steamship company, with reference to cargoes to Hong Kong and Batavia, was for the ship taking the cargo at San Francisco to carry the same to Hong Kong without transshipment; but in this case the cargo was transhipped in Yokahama (without necessity,) to other ships of the Company, and by them carried to Hong Kong where it was lost.
Held: The "connections" referred to in the policy were the regular connections of the company only, and the term was not intended to include a casual, unusual and unanticipated connection with a ship substituted for the occasion upon a state of things temporary in its nature, and unknown at the time that the contract was made. The loss at Hong Kong occurred subsequent to the change of ship, and under the terms of the policy the defendant was not responsible.—*Id.*

MARRIED WOMAN, EXECUTION OF MORTGAGE BY.

EXECUTION OF MORTGAGE BY MARRIED WOMAN—ACKNOWLEDGMENT—COMPLAINT—FINDINGS.—In an action to foreclose a mortgage, the complaint alleged, and the Court found that the defendant, a married woman, "made, executed, and delivered" the instrument.

Held: The finding that the mortgage was "executed" imported that it was "acknowledged."—*Joseph v. Dougherty*, 358.

MAXIM. See SURETIES, 2.

MEASURE OF DAMAGES. See WARRANTY, 2.

MECHANICS LIEN. See FORECLOSURE, 1. 2.

MEDICAL JURISPRUDENCE, READING FROM BOOK ON. See MURDER, 3.

MENTAL INCOMPETENCY. See DEED, 1.

MEXICAN GRANT. See EJECTMENT, 8.

MINERAL LANDS. See PATENT.

MINING LAW.

MINING LAW—LOCAL REGULATIONS—CUSTOMS—INSTRUCTIONS.—In an action of ejectment for a mining claim, the Court instructed the jury, that the location of a mining claim must not only observe the law of Congress (Act of May 10, 1872, Statutes at Large), which requires that "ten dol

MINING LAW (Continued).

lars' worth of labor shall be performed or improvements made each year for each one hundred feet in length along the vein," but also the local regulations of the miners of the district, which require "that work shall be done every sixty days on the claim."

Held: The Court erred; there is a clear conflict between the law and the regulations, and the law must prevail.—*Original Company of the Williams & Kellinger etc. v. Winthrop Mining Company*, 631.

MISCONDUCT IN OFFICE. See **INDICTMENT**, 1, 2, 3.

MISDEMEANOR. See **INDICTMENT**, 1, 2; **JUDGMENT FOR PAYMENT OF FINE**, 1, 2; **JURISDICTION**, 1, 4, 5.

MISTAKE. See **DISCRETION OF COURT**.

MISTAKE IN NAMING. See **BILL OF EXCEPTIONS**, 1, 2.

MISTAKE IN QUANTITY. See **PROMISSORY NOTE**, 1.

MONEY HAD AND RECEIVED.

1. **MONEY HAD AND RECEIVED—TENANTS IN COMMON—OUTSIDE LANDS OF SAN FRANCISCO—ORDER NUMBER 800.**—On June 5, 1861, the defendant, then being the claimant of a certain tract of land called the Donahue Tract, part of the lands known as the outside lands of the City and County of San Francisco, by a bargain and sale, deed conveyed an undivided interest therein equal to ten acres to one B., and also interests to others. After the passage of the Act of Congress of March 6, 1866: "To quiet the title to certain lands within the corporate limits of the City of San Francisco," and the act of the Legislature confirming order 'No. 800' of the Board of Supervisors of San Francisco, the defendant caused the Donahue Tract to be delineated upon the map of the outside lands, and paid all the necessary taxes and assessments; and a part of the tract being taken for Golden Gate Park, and an award made therefor, received the amount of the award from the proper officer of the city—except a portion thereof retained by the officer for the purpose of paying the shares of the vendees of defendant other than B., and executed to the city a deed for the land taken. The names of the other vendees appeared upon the map; but neither B. nor any of his grantees, ever had actual possession of any part of the land, or paid any part of the taxes or assessments, or had any thing to do with the delineation of the claim upon the map. Action by an assignee of B. to recover of the defendant the proportion of the money received by him corresponding to B.'s interest in the land.

Held: It does not appear that D. took upon himself to act for B.; their relationship as tenants in common did not cast upon him that duty; therefore it does not appear that by any agreement express or implied, or by any obligation, the moneys received by D. were received in whole or in part for or on account of B. or his interest.—*Howard v. Donahue*, 264.

2. **MONEY HAD AND RECEIVED—ACTION FOR MORTGAGE.**—The plaintiff being the equitable owner of certain land caused the same to be conveyed to

MONEY HAD AND RECEIVED (Continued).

the defendant as security against loss on account of a promissory note executed by the defendant, with, and as surety for, the plaintiff, and which was afterwards paid by the plaintiff. The defendant sold the property to innocent purchasers and received the purchase money.

Held: The plaintiff was entitled to recover the amount received after deducting expenses.—*Scranton v. Begol*, 642.

MONO COUNTY WARRANTS. See TERRITORIAL JURISDICTION OF THE STATE, 1.**MONTEREY COUNTY, RECORDER OF.**

FEEs OF RECORDER OF MONTEREY COUNTY—STATUTES—CONSTITUTIONAL LAW.—"An Act in relation to the County Officers of Monterey County" was passed on March 30, 1878; but so far as the salary of the Recorder was concerned was by its provisions to go into effect on the first Monday in March, 1880.

Held: The provisions relating to the salary of the Recorder never went into effect. (Cons. Art. i.)—*Speegle v. Joy*, 278.

MORTGAGE.

MORTGAGE—ATTORNEY'S FEE—FORECLOSURE.—The mortgage foreclosed provided for "counsel fees and changes of attorneys, and counsel employed in such foreclosure suit not exceeding —." *Held*, counsel fees were properly allowed.—*Alden v. Pryal*, 215.

See ATTACHMENT; DEED OF TRUST; FORECLOSURE, 5; MARRIED WOMAN; MONEY HAD AND RECEIVED, 2; PROMISSORY NOTE, 1; TAXATION, 18, 19, 20.

MORTGAGE REDEMPTION. See LIMITATIONS, STATUTE OF, 1.**MORTGAGE SALE. See ESTOPPEL, 2.****MORTGAGOR AND MORTGAGEE. See TAXATION OF SATISFIED MORTGAGE, 3.****MOTION. See JUDGMENT, MOTION TO SET ASIDE.****MUNICIPAL CORPORATION. See ROAD TAX.****MUNICIPAL COURT OF APPEALS. See JURISDICTION, 7, 8, 9.****MUNICIPAL ORDINANCE.**

1. **MUNICIPAL ORDINANCE—JUDGMENT—FINE AND IMPRISONMENT.**—The petitioner was convicted in the Police Court of the city and county of San Francisco under Section 33 of Order No. 1,587 of the city and county, of a misdemeanor, in visiting a place for the practice of gambling. The judgment was "that said Chin Yan pay a fine of twenty (20) dollars, and in default of payment thereof, that said Chin Yan be imprisoned in the County Jail of this city and county for the period of ten days;" and

MUNICIPAL ORDINANCE (Continued).

the commitment was "for the period of ten days or until the said fine should be paid or satisfied."

Held: We consider this judgment valid and lawful upon the authority of *Ex parte Ellis*, 54 Cal. 204. The authority given to the Sheriff to arrest and imprison the defendant for the period of ten days or "*until said fine has been paid or satisfied*," authorizes the petitioner to claim his release, when the fine has been satisfied by the imprisonment, or partly by payment of money and partly by the imprisonment, estimating the latter at two dollars per day during the period of imprisonment. Such is a fair deduction from the judgment.—*Ex parte Chin Yan*, 78.

2. ID.—CONSTITUTIONAL LAW.—The section referred to is not unconstitutional, as opposed to Subdivision 2, Section 25 of Article iv. of the Constitution of 1879. Section 3 of the amendment of the consolidation act of April 25, 1863, gives full authority to the Board to pass the order under consideration and the act itself is not unconstitutional. The object of the article of the constitution relating to local legislation is to restrain the Legislature from passing laws of the character mentioned. The Legislature can authorize by general laws, under the present Constitution, ordinances of that character to be passed by a municipal corporation.—*Id.*
3. ID.—ID.—CASES DISTINGUISHED.—The Traylor Act, declared unconstitutional in *Earle v. Board of Education* (55 Cal. 481), was an act of the Legislature. *Desmond v. Dunn*, 55 Cal., 242; and *McDonald v. Patterson*, 54 Id. 245, have no reference to the question before us.—*Id.*
4. ID.—ID.—UNREASONABLE ORDINANCE.—Where the Legislature in terms confers upon a municipal corporation the power to pass ordinances of a specified and defined character, if the power thus delegated be not in conflict with the Constitution, an ordinance passed pursuant thereto can not be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental powers of the corporation, or under a grant of power general in its nature. In other words, what the Legislature distinctly says may be done can not be set aside by the Courts because they may deem it unreasonable or against sound policy. But where the power to legislate on a given subject is conferred and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid.—*Id.*
5. MUNICIPAL ORDINANCE—JUDGMENT—FINE AND IMPRISONMENT.—*Ex parte Lawrence*, 84.

MURDER.

1. MURDER—INSTRUCTIONS—PLEA OF "NOT GUILTY"—ISSUES.—The Court in its charge to the jury among other things said: "The evidence in this case upon the point whether the defendants or either of them are the persons who committed the offense with which they are charged, is conflicting. The defendants, by their plea of not guilty, have rested their defense upon the sole ground that they nor either of them are the persons who committed the offense of which they stand charged. It follows from this statement of the case, if you find from the evidence beyond a reasonable doubt that they are the persons who killed or aided and

MURDER (Continued).

assisted in the killing of the deceased at the time, and in the manner charged in the information, then *you must find the defendants guilty of murder of the first degree*, as there are no circumstances in the case to reduce the offense below that degree." *Held*: This instruction is clearly erroneous.—*People v. Ah Lee*, 85.

2. **ID.—RES GESTÆ.**—(Sharpstein and Thornton, JJ.) On the trial the District Attorney over the objection of defendant was permitted to ask the witness the following question: "Have you told all that you heard either of the parties (the deceased or defendants) say at the time of the stabbing or immediately after?"

Held: Where declarations offered in evidence are merely narrative of a past occurrence, they can not be received as proof of the existence of such occurrence.—*Id.*

3. **MURDER—TRIAL—ARGUMENT—READING FROM BOOK ON MEDICAL JURISPRUDENCE.**—Upon the trial of an information for murder, the District Attorney, in his closing argument to the jury, said he would read, "as a portion of his argument," from a book called "Browne's Medical Jurisprudence of Insanity." No testimony had been introduced to show that this was a recognized work or standard authority, or that it was a scientific work. The defense objected to said book, or any part thereof, or to any opinion of said alleged writer, on the ground that it had not been established to be a scientific work, or a standard or recognized authority, and that it was *incompetent*. The Court overruled the objections, and defense excepted; and the District Attorney did read from the book various sections thereof, commenting upon and treating of the subject of insanity, and sustaining the prosecution's theory of the case.

Held: The Court erred in permitting the District Attorney to read the extracts referred to.—*People v. Wheeler*, 581.

See **SELF-DEFENSE**, 1-4.

NAME. See **LARCENY**, 3.

NATIONAL BANK.

NATIONAL BANK—LIMITATION ON RATE OF INTEREST.—Section 30 of the National Banking Act (Rev. Stats. § 5197) provides: "Every association organized under this Act may take, receive, reserve and charge on any loans * * * interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more; except that where by the laws of the State, a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed every association organized in any State under this Act."

Held: Under this section—construed with §1918 C. C.—the national banks in this State are allowed to charge and receive such rates of interest as may be agreed upon.—*Hinds v. Marmolejo*, 229.

See **PROMISSORY NOTE**, 3, 4.

NEGLIGENCE. See **DEATH, ACTION FOR**, 1, 2, 3, 4.

NEW CITY HALL COMMISSIONERS. See **INDICTMENT**, 1, 2.

NEW TRIAL.

1. **NEW TRIAL—AUTHENTICATION OF STATEMENT—CERTIFICATE.**—A motion for new trial was submitted upon a statement certified to be correct by the attorneys of both parties. *Held*: The statement not being signed and certified by the Judge of the Court below, as required by Sub. 4, § 659 C. C. P., must be disregarded.—*Schreiber v. Whitney*, 431.

2. **NEW TRIAL—EJECTMENT—POSSESSION—SUFFICIENCY OF FINDINGS—DECISION AGAINST LAW.**—In an action of ejectment issue was taken on the allegation of possession by defendant at the commencement of the action, and on this issue evidential facts were found by the Court, but not the ultimate fact of possessed or not possessed.

Held: There being no finding on this issue the decision of the Court below was against law, and a new trial was rightly granted.—*Soto v. Irvine*, 436.

3. **NEW TRIAL—DISMISSAL OF MOTION—ORDER DENYING MOTION—PRACTICE.**—After a notice of intention to move for a new trial had been filed and a statement duly prepared and certified and filed, the Court made an order dismissing the motion for want of prosecution.

Held: The order must be considered as an order denying the motion; and the case is properly here on appeal.—*Voll v. Hollis*, 569.

See **APPEAL**, 4, 5; **STIPULATION**.

NONSUIT. See **APPEAL**, 7.

NOTICE. See **REPLEVIN**, 1; **TAXATION**, 3; **UNDERTAKING ON APPEAL**, 1.

NOTICE OF MOTION. See **JUDGMENT**, **MOTION TO SET ASIDE**, 2.

NOVATION. See **PROMISSORY NOTE**, 5.

NUISANCE. See **ABATEMENT OF**.

NUNC PRO TUNC. See **JURISDICTION**, 7.

OPTION TO CONSIDER WHOLE AMOUNT DUE UPON FAILURE TO PAY INSTALLMENTS. See **FORECLOSURE**, 5.

ORDER DENYING MOTION. See **NEW TRIAL**, 3; **PLACE OF TRIAL**.

ORDER, EX PARTE. See **RECEIVER**.

ORDER NUNC PRO TUNC. See **JURISDICTION**, 7.

ORDINANCE.

ORDINANCE—CONSTRUCTION OF CONTRACT—REMOVAL OF DEAD ANIMALS.—

An ordinance of the City of San Francisco provided that, whenever any horse or other animal should die within the limits of the city and county, the owner thereof, or the person in whose possession the same might be at the time of its death, should dispose of its carcass in such a manner that the same should not become a nuisance or should notify W. or his associates or assigns within twenty-four hours where such carcass might

ORDINANCE (Continued).

be found, etc.; and also provided that no person other than the said W. or his associates or assigns or the person owning or having possession of any animal at the time of its death should remove or dispose of the carcass of such animal unless the said W. and his associates and assigns should fail to remove the same within twenty-four hours after receiving notice thereof.

Held: By the provisions of this ordinance the owner or the person, in whose possession the animal should be when death occurred, was given the right to dispose of the carcass in such a manner as not to become a nuisance at any time within twenty-four hours after death, and it was competent for him to exercise that right in any way he should see fit by contract or otherwise. — *Alpers v. Brown*, 447.

See SAN FRANCISCO, OUTSIDE LANDS OF; MONEY HAD AND RECEIVED, 1; WATER RATES, 1, 2, 3.

OTHER ACTION PENDING. See UNLAWFUL DETAINER, 3.

• OUSTER. See EJECTMENT, 4, 5, 6, 7.

OVERDRAFTS.

1. OVERDRAFTS—LIABILITY OF OFFICERS TO A BANK—INSTRUCTIONS—USAGE. Action by a bank against its President for the amount of overdrafts of one C., alleged to have been drawn for the benefit of the business of a hotel in which the defendant and C. were jointly interested, and to have been paid by direction of the defendant. The verdict and judgment were for the plaintiff. The evidence tended to show that the money was drawn for use in the joint business as alleged; that C. was induced by the defendant to open an account with the bank, and that at various times, from April 1st to July 9th, overdrafts of C. were paid by direction of defendant; that at the latter date (the account then showing a balance in favor of C.) defendant, by reason of ill-health, left the city, and was absent from the bank till July 30th, but before absenting himself did not give instructions to the Cashier not to pay overdrafts; that during his absence the overdrafts in question were made and paid by the Cashier; that according to the by-laws of the plaintiff it was the duty of the Finance Committee to pass upon and to allow or refuse all loans. The Court instructed the jury in effect, that if the overdrafts of C. during the months of April, May, and June, were authorized by the defendant it was the duty of defendant, upon absenting himself, to instruct the Cashier to discontinue paying the overdrafts of C.; that the question was: were the overdrafts made in the month of July, which were lost to the bank, paid by the Cashier in the course of a dealing established and inaugurated by the defendant, or were they paid by the Cashier contrary to or against the express directions of the defendant; also, that a usage at the bank (of which there was some evidence before the jury) to allow customers to overdraw, would not justify an officer of the bank in case of loss; that such usage was nothing more than a usage or practice to misapply the funds of the bank.

OVERDRAFTS (Continued).

Held, The law as applicable to this case was, in substance, correctly given by the Court below. There were, substantially, but two questions for the jury to consider, viz.: 1. Did Wilcox inaugurate the account and its method of being carried on, and direct officers of the bank to pay overdrafts, and were the amounts of overdrafts after July 9th paid in pursuance of and as a part of the method inaugurated by Wilcox? 2. Was he interested in the business of the hotel, and in maintaining it? These questions answered in the affirmative fix the liability upon him, and to sustain such answers the evidence is ample.—*Oakland Bank of Savings v. Wilcox*, 126.

2. **ID.—ID.—ID.—IMMATERIAL ERROR.**—An instruction indicating that all overdrafts, under all circumstances, constitute fraud, and also an instruction that "if he (the president) should fail in skill," he would be responsible, *held* to be incorrect, but in view of the actual issues involved, not calculated to injure the defendant.—*Id.*
3. **ID.—ID.—BY-LAWS.**—Where the by-laws of a bank forbid loans to be made without the approbation of the finance committee, it is a violation of duty for the President or Cashier to loan upon his or their own judgment.—*Id.*
4. **ID.—ID.—BREACH OF TRUST—FIDUCIARY.**—An officer of a bank can not make profit to himself out of the loans made by him of the money of the bank, and if losses occur in the attempt he must bear the losses.—*Id.*
5. **ID.—ID.—INSTRUCTIONS.**—There was no error in refusing the instructions asked for by defendant and refused.—*Id.*

OWELTY OF PARTITION, SUBSEQUENT MORTGAGE FOR. See ATTACHMENT.**PARTIES.**

PARTIES—JOINDER OF PARTIES—ACTION—TRUSTEE—BOND.—The defendant, C., entered into a contract with the plaintiff, D., for the construction of a building upon a lot belonging to them, upon which the plaintiff, the Savings and Loan Society, held a mortgage; and for the faithful performance of the contract, C. and the other defendants as sureties gave their bond to the Savings and Loan Society, for the benefit of all the plaintiffs.

Held (in an action for a breach of the bond): The plaintiffs were properly joined.—*Daley v. Cunningham*, 530.

See EJECTMENT, 9; PRESUMPTION, 1, 2; SUBSTITUTION OF.

PARTITION. See ATTACHMENT; ESTOPPEL, 1.**PATENT.**

1. **PATENT—MINERAL LANDS—STATUTE OF LIMITATIONS—CONSTRUCTIVE TRUST.**—Action to quiet title. The plaintiff deraigned title under a patent of the United States issued within five years of the commencement of the action. The defendants pleaded title by the statute of limitations; and also facts which they contended constituted the plaintiff trustee for them of the title; but on this issue the Court found against them.

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PATENT (Continued).

Held, as to the latter defense, that the finding was justified by the evidence, and as to the former that the statutes could not avail the defendants against the patentee.—*Nessler v. Bigelow*, 98.

2. PATENT—CONSTRUCTIVE TRUST—REVIEW OF DECISION OF LAND OFFICERS—PURCHASER IN GOOD FAITH—COMPLAINT—LEGAL CONCLUSIONS—CERTIFICATE OF PURCHASE—EVIDENCE—RIGHT OF PRE-EMPTION UNDER THE ACT OF JULY 23, 1866.—In an action by the assignee of a purchaser from the State under an invalid selection—claimed to have been confirmed by the Act of Congress of July 23, 1866, “to quiet land titles in California”—against a pre-emption claimant, to whom, after a contest before the Land Department, a patent had been issued—the object of the action being to have the defendant adjudged a trustee of the legal title for the plaintiff—the complaint alleged that on the contest the commissioner “found as a matter of fact, that in the year 1863, the State of California selected and located said land under the laws of said State, and did thereafter sell and dispose of the same to the grantor of the plaintiff, as is hereinbefore more fully stated; and that on the seventeenth day of February, 1864, the grantor of the plaintiff became the purchaser in good faith of said land from the State under her laws—paid the purchase price and received a certificate of purchase therefor as hereinbefore stated;” * * * that the only objection made to said claim, on said contest and investigation, and the only objection which has ever existed thereto, was the fact that said land so selected and located as aforesaid was embraced by said exterior boundaries of the Mexican grant “Las Pocitas.” * * * that said contest and investigation was had long after said tract of land in question had been forever excluded from any claim under said Mexican grant;” and that the decision of the commissioner and of the Secretary of the Interior was based solely on this mistake of law; but it did not appear from the allegations of the complaint that the plaintiff’s grantors had complied with the laws of the State so as to constitute them *bona fide* purchasers except so far as this might appear from the general averment that they were purchasers in good faith and that a certificate of purchase had issued to them; nor was it alleged that the plaintiff himself was a *bona fide* purchaser from his assignors.

Held: The complaint was fatally defective in not alleging the facts essential to constitute the plaintiff’s grantors purchasers in good faith from the State. The general averment that they were such purchasers was an averment of a conclusion of law only. The certificate of purchase, having been issued for land not subject to location, and being consequently void, was not competent evidence of the purchase. The complaint was also defective in not alleging that the plaintiff himself was a purchaser in good faith from his assignors. Inferentially he became the owner of the certificate after the decision of the Land Department, and assuming this to be the fact, he bought with notice of the possession of the defendant, of the judgment in his favor, and of the issuance of the patent, and was therefore not a *bona fide* purchaser from the State within the meaning of the Act. The complaint was also defective in not alleging that the land, in lieu of which it was alleged the land in dispute was selected, had been lost to the State.—*Aurrecoechea v. Sinclair*, 532.

See EJECTMENT, 8.

PAYMENT. See **FAMILY ALLOWANCE**, 1; **PROMISSORY NOTE**, 5.

PAYMENT OF FINE. See **JUDGMENT FOR**, 1, 2, 3.

PENDENCY OF ADMINISTRATION. See **ESTATES OF DECEASED PERSONS**, 1.

PERSON. See **TAXATION**, 20.

PERSONAL PROPERTY. See **CONVERSION**.

PETIT LARCENY. See **JURISDICTION**, 1.

PETITION. See **CERTIORARI**, 2; **TAXATION**, 13.

PHYSICIAN'S SERVICES ON POST-MORTEM EXAMINATION. See **CLAIM AGAINST COUNTY**.

PLACE OF TRIAL.

PLACE OF TRIAL—ACTION FOR DIVERSION OF WATER—APPEAL FROM ORDER REFUSING TO CHANGE THE PLACE OF TRIAL.—Appeal from order denying defendant's motion for change of place of trial. The action was for the diversion of water from the plaintiff's ditch, and was commenced in Tulare County. The defendant's principal and only place of business was in Fresno County. The plaintiff's ditch is situated partly in Fresno and partly in Tulare County—the head of the ditch and the point of diversion of the water by the defendant being in the former county.

Held: The order denying the motion was correct. The right of the plaintiff, as stated in the complaint, to have the water flow in the river to the head of its ditch is an incorporeal hereditament appurtenant to the ditch, and is co-extensive with plaintiff's right to the ditch itself. The subject of the action is, therefore, situated in both counties and the action might have been brought in either. The injury is not confined to that part of the ditch in Fresno County.—*Lower Kings River Water Ditch Co. v. Kings River and Fresno Canal Co.*, 408.

PLEA OF "NOT GUILTY." See **MURDER**, 1.

PLEADING.

PLEADING—DENIAL OF EXECUTION OF WRITTEN INSTRUMENT—RELEASE—ISSUES—EVIDENCE—PRACTICE.—In an action for damages for the death of the plaintiff's minor son—alleged to have been killed by the negligence of defendant—the defendant pleaded in bar a release in writing by the plaintiff of all demand for the damages sued for, and in his answer inserted a copy of the release. The execution of the release was not denied by the plaintiff, in the mode required by Section 448, C. C. P., but the evidence was offered by the plaintiff, and admitted without objection, tending to show that at the time he signed the release he was incompetent to contract. The verdict was for the plaintiff.

PLEADING (Continued).

Held: Under such circumstances, the defendant can not be allowed to raise the point in this Court, that the verdict of the jury is against an admission made by the pleadings.—*Crowley v. City Railroad Company*, 628.

See EJECTMENT, 3-7; FORECLOSURE, 2, 5; JUDGMENT; PROMISSORY NOTE, 2, 5; SALE, 1; SLANDER OF TITLE, 1, 2; UNDERTAKING ON ATTACHMENT, 4; VERIFICATION OF, BY AGENT.

PLEDGE BY CONSIGNEE. See REPLEVIN, 1.

PLUMAS COUNTY, FEES OF CLERK OF SUPERVISORS.

FEES OF CLERK OF BOARD OF SUPERVISORS OF PLUMAS COUNTY—STATUTES—CONSTITUTIONAL LAW.—The provisions of the Act of 1878, relating to fees of county officers in Plumas County (Stats. 1877-8, p. 547), which were to take effect on the first Monday of March, 1880, never went into effect.—*Whiting v. Haggard*, 513.

POLICE POWER. See SUNDAY LAW, 1, 2.

POLICY OF THE LAW. See UNDERTAKING ON ATTACHMENT, 3.

POLITICAL CODE. See TAXATION, 2, 16.

POSSESSION OF DEFENDANT. See EJECTMENT, 2; NEW TRIAL, 2.

POSSESSION OF STOLEN PROPERTY.

1. POSSESSION OF STOLEN PROPERTY—LARCENY—PRESUMPTION.—To justify the inference of guilt from the fact of possession of stolen property, it must appear that the possession was personal, and that it involved a distinct and conscious assertion of possession by the accused.—*People v. Hurley*, 74.
2. ID.—ID.—ID.—The better opinion seems to be, that the presumption arising from possession alone is completely removed by the *good character alone* of the prisoner.—*Id.*
3. ID.—ID.—ID.—A finding of stolen property in the prisoner's house or apartment, is equally competent in evidence against him as a finding upon his person; but the house or room must be proved to be in his exclusive occupation. If the property were in a locked-up room or box, of which he kept the key, it would be a fair ground for calling upon him for his defense. But if it were only found lying in a house or room in which he lived jointly with others equally capable of having committed the theft, it is clear that no definite presumption of guilt could be made.—*Id.*
4. ID.—ID.—ID.—The bare fact of finding the hides of cattle, that had been stolen, in the defendant's barn, which was shown to have been open to any one who chose to enter it, in the absence of any evidence tending to prove that he knew or had any reason to suppose that such hides were there, is not sufficient to justify the inference of guilt; and until his declaration, that he knew nothing about the hides being there, was shown to be false, he was not called upon to give any explanation as to how they came there.—*Id.*

POWER OF APPOINTMENT. See SUPERVISORS, 1.

POWER TO EMPLOY COUNSEL. See CITY HALL COMMISSIONERS.

PRACTICE. See AMENDMENT, 4-7; APPEAL, 5; BILL OF EXCEPTIONS, 1; JUDGMENT BY DEFAULT, 2, 3; NEW TRIAL, 3; PLEADING; STIPULATION; UNDERTAKING ON APPEAL, 2.

PRE-EMPTION. See EJECTMENT, 8; PRIOR POSSESSION, 2; RIGHT OF, UNDER ACT OF JULY 23, 1866; PATENT, 2.

PREMATURE ACTION. See FORECLOSURE, 1.

PRESUMPTION.

1. PRESUMPTIONS IN FAVOR OF JUDGMENT—ACTION ON STREET ASSESSMENT—DISMISSAL OF PARTIES DEFENDANT.—A decree for the plaintiff in an action to foreclose a lien for street assessments, recited that the action was dismissed as to some of the defendants. The defendant appealed upon the judgment roll.

Held: All presumptions are in favor of the correctness of the proceedings of Courts of general jurisdiction, and as the consent of the defendants would have justified the order, we must presume that such consent was given, there being nothing in the record to show that it was not.—*Parker v. Altschul*, 380.

2. *Id.*—*Id.*—*Id.*—CASES DISTINGUISHED.—*Clark v. Porter*, 53 Cal. 409; *Diggins v. Reay*, 54 *Id.* 525; *Harney v. Applegate*, 57 *Id.* 205; *Tobleman v. Roper*, 7 P. C. L. J. 56; distinguished.—*Id.*

See EJECTMENT, 8; JURISDICTION, 2, 3; POSSESSION OF STOLEN PROPERTY, 1-4; UNDERTAKING ON APPEAL, 3.

PRESUMPTION OF LAW. See EJECTMENT, 5; LIMITATIONS, STATUTE OF, 2.

PRIOR POSSESSION.

1. PRIOR POSSESSION—EJECTMENT—FINDING.—Ejectment upon an alleged prior possession. Findings upon this issue and judgment for defendant. *Held:* The finding was justified by the evidence.—*Stevens v. Quirk*, 161.
2. *Id.*—*Id.*—IMMATERIAL FINDING—PREEMPTIONER.—*Held further:* The finding that the defendant entered as preemptioner was not sustained by the evidence; but the fact found is immaterial.—*Id.*

PROBATE PROCEEDINGS. See APPEAL, 10.

PROBATIVE FACTS. See LIMITATIONS, STATUTE OF, 2.

PROMISSORY NOTE.

1. PROMISSORY NOTE—MORTGAGE—FAILURE OF CONSIDERATION—SALE OF LAND—FRAUD—MISTAKE IN QUANTITY.—In an action to foreclose a mortgage for the purchase money of land sold and conveyed to the mortgagor by the mortgagee, the defendant set up in his answer, and on the trial in

PROMISSORY NOTE (Continued).

effect offered to prove false and fraudulent misrepresentations as to the boundaries and quantity of land sold, a partial failure of title and an offer to rescind; but did not offer to prove eviction. *Held*, that the evidence was rightly excluded. (McKee, dissenting).—*Alden v. Pryal*, 215.

2. PROMISSORY NOTE—SURETIES—PLEADING.—In an action upon a promissory note signed by S. and L. & S., the latter pleaded that they executed the note as sureties of, and for his accommodation, which fact the plaintiff well knew.

Held: This is not an issuable averment that the defendants contracted with the bank in the capacity of sureties for their co-obligor; it was incumbent upon them in order to set up the defense (under § 2832 C.C.), that they executed the note as sureties, to aver and prove that the payee of the note not only knew of the fact of suretyship between them and their co-obligor, but consented to deal with them in that capacity.—*Farmers' National Gold Bank v. Stover*, 387.

3. ID.—NATIONAL BANKS—INTEREST.—It is no defense to an action on a note made to a national bank, that the bank knowingly took a greater rate of interest than allowed by law; the remedy in such a case is to recover back twice the amount paid.—*Id.*

4. ID.—ID.—ID.—National Banks in this State may charge and receive such rates of interest as may be agreed upon in writing, pursuant to § 1918 C. C.—*Id.*

5. ID.—PAYMENT—NOVATION—VARIANCE—AMENDMENT OF PLEADING.—Under the issue of payment, evidence was introduced by L. & S. tending to prove that S. executed and that the bank took as a substitution for and in full payment and satisfaction of the note sued on, his individual note secured by mortgage on his homestead and other property, and the evidence being objected to as inadmissible under the pleadings, asked leave to amend their answer so as to allege the facts proven by the evidence; but the Court excluded the evidence and denied the motion to amend.

Held: If the note and mortgage were in fact taken as a substitute for the note in dispute with the intent of extinguishing the obligation of it or releasing the parties to it, the transaction constituted a defense by way of novation under §§ 1530-32 C. C.; and conceding the evidence to have been inadmissible under the plea of payment, the Court should have allowed the pleadings to be amended so as to conform to the facts proved by it.—*Id.*

See DISCRETION OF COURT.

PROPERTY. See EMBEZZLEMENT.

PUBLIC NUISANCE.

1. ACTION FOR PUBLIC NUISANCE—JUDGMENT ON THE PLEADINGS.—Appeal from a judgment for the defendant in an action for damages for a public nuisance committed by obstructing a highway, and from an order denying a motion made by the plaintiff after judgment to set aside the judgment and enter judgment in his favor on the pleadings.

Held: The motion was irregular and was properly denied; and if a like notice had been made at the commencement of the action, it should have

PUBLIC NUISANCE (Continued).

been denied, because all the material allegations of the complaint are denied in the answer.—*Tibbets v. Blade*, 428.

2. **ID.—EVIDENCE—EJECTMENT.**—Even if the action could be construed as in ejectment for the premises alleged to have been intruded upon by the defendant, evidence as to the intrusion was properly excluded in the absence of evidence of seisin or possession by plaintiff.—*Id.*
3. **ID.—COMPLAINT.**—But the complaint clearly shows that the action is to recover damages for a public nuisance and is defective in not alleging special damages to the plaintiff.—*Id.*

PUNISHMENT. See **BATTERY**; **JUDGMENT FOR PAYMENT OF FINE**, 1.

PURCHASER IN GOOD FAITH. See **PATENT**, 2; **UNRECORDED DEED**, 1, 2.

QUIET TITLE, ACTION TO. See **TIDE LAND**, 1.

RAILROADS. See **TAXATION**, 8.

RAILROAD CORPORATIONS. See **TAXATION**, 1, 5, 6, 7. 18-21.

RAPE.

RAPE—SUFFICIENCY OF EVIDENCE.—*People v. Castro*, 118.

REAL ESTATE BROKER.

REAL ESTATE BROKER—AGENT—SALE—COMMISSIONS—CONSTRUCTION OF CONTRACT.—By an agreement in writing, the plaintiff was authorized by the defendant, at any time within sixty days, to sell his mine for a sum not less than sixty-five thousand dollars; and within the time specified, made a written agreement with H., a responsible purchaser, in the name of his principal, for the sum of seventy-five thousand dollars—H. to have twenty days to examine the title, and if the same was not good and to the satisfaction of H., the agreement to be void. At the same time the plaintiff made a separate written agreement with H. that if the defendant did not sign the agreement on or before twelve o'clock m., August 26, 1878, H. should be released from the contract. The defendant refused to sign the agreement within the time specified, and H., on that ground, notified the plaintiff that he withdrew from the contract. The Court found that the plaintiff did not procure a purchaser.

Held: By refusing to ratify the agreement the defendant refused to sell the property to H. at the price, and on the terms which he had agreed with the plaintiff to sell it; and this being so, the finding that the plaintiff did not procure a purchaser able and willing to purchase the property is against the evidence.—*Neilson v. Lee*, 555.

REASONABLE DOUBT. See **ROBBERY**, 2-4; **SELF-DEFENSE**, 4.

REASONABLE TIME. See **CONTRACT**, **CONSTRUCTION OF**.

RECEIVER.

APPOINTMENT OF RECEIVER IN INSOLVENCY PROCEEDINGS—EX PARTE ORDER
—POWER OF JUDGE AT CHAMBERS.—A receiver may be appointed in an insolvency proceeding (as well as in ordinary cases) by the Judge at Chambers upon an *ex parte* application.—*Real Estate Associates v. Superior Court of the City and County of San Francisco*, 223.

RECLAMATION. See SWAMP LAND ASSESSMENT, 1-4.

RECORD. See JURISDICTION, 8.

RECORD, CORRECTION OF. See APPEAL, 2, 3; JURISDICTION, 3.

RECORD ON APPEAL. See APPEAL, 7, 8, 9.

REDEMPTION OF LAND. See LIMITATIONS, STATUTE OF, 1; SLANDER OF TITLE, 3.

RELEASE. See DEATH, ACTION FOR, 1; PLEADING.

RELEVANCY OF INSTRUCTIONS. See ROBBERY, 2, 3, 4.

RELIGIOUS FREEDOM. See SUNDAY LAW, 1, 2.

RENT.

ACTION FOR RENT—HOLDING OVER—FINDINGS—SUFFICIENCY OF EVIDENCE.
In an action for rent the complaint alleged a written lease, and a holding over after the expiration thereof. The Court found that there was no written lease, but an express contract from year to year to pay three hundred dollars per annum.

Held: The finding is not supported by the evidence; and the judgment cannot be sustained upon the ground there was no implied agreement to pay the value of the use and occupation, because the Court does not find what was the value.—*Le Blanc v. Crawford*, 361.

See DEMAND FOR.

REPEAL OF STATUTE. See LICENSE TAXES, 2.

REPLEVIN.

1. **REPLEVIN—PLEDGE BY CONSIGNEE OF GOODS—NOTICE.**—Goods were shipped by the plaintiff to the California Type Foundry Company with the following written instructions; "as I wrote you before, I want you to keep these consignment goods as such—as my property until sold." While the property was still in the warehouse of the Railroad Company the consignee pledged the goods to F. Bros. and the property was then placed in defendants' custody to be kept in store for F. Bros.

Held: Passing the question whether the mere possession of property, under written instructions showing that the possessor has no title, would be sufficient evidence of ownership to protect the pledgee who advances his money on the bare statement of the possessor that he is the owner,—in this case the pledgor was not in the actual possession of the property at

REPLEVIN (Continued).

the time the loan was negotiated. F. Bros. must have seen (from the letter of instructions), that the plaintiff was the owner of the property, had they required some evidence of title in the proposed pledgor as they ought to have done.—*Chicago Taylor Printing Press Company v. Lowell*, 454.

2. **REPLEVIN—SALE OF PERSONAL PROPERTY—FRAUD AS TO CREDITORS—CHANGE OF POSSESSION.**—In an action to recover the possession of personal property—in which the defendant justified as Sheriff, under an attachment against one C., alleged in the answer to be owner—it appeared from the evidence that the property (consisting of the stock of a drug store) was purchased by the plaintiffs' vendor from the assignee in bankruptcy of C., and that C., who was then in possession, was allowed to remain in possession pending negotiations for a purchase by him; that subsequently the plaintiffs made a written agreement to sell the property to C. upon certain terms, and that, upon the failure of C. to comply with the terms of the contract, the plaintiffs took possession some time prior to the levy of the attachment. The findings and judgment were for the plaintiffs.

Held: At the time of the transfer it was the assignee who was in possession and had control of the property, and there is no evidence which tends to prove that he did not immediately deliver it to the purchaser, or that the sale was not followed by an actual and continued change of possession. Therefore the transfer can not be conclusively presumed to be fraudulent as against the creditors of the bankrupt.—*Redington v. Nunan*, 632.

3. **ID.—ID.—ID.—SUFFICIENCY OF EVIDENCE—FINDING.**—Whether the property at the time of the seizure of it was the property of the plaintiff, is a question for the Court, sitting in place of a jury, to determine; the evidence being conflicting, the finding upon that point can not be disturbed.—*Id.*
4. **ID.—DAMAGES—CONVERSION.**—The action being for the recovery of possession of personal property, and not for its conversion, it was error for the Court to include in the judgment the money expended by the plaintiff in the pursuit of the property.—*Id.*

RES ADJUDICATA. See **ESTOPPEL**, 1.

RES GESTÆ. See **DEED**, 5; **MURDER**, 2.

RESOLUTION OF INTENTION. See **STREET ASSESSMENT**, 1.

RIGHT OF WAY.

1. **RIGHT OF WAY—LIABILITY OF HEIR ON COVENANT OF ANCESTOR—WARRANTY—QUIET ENJOYMENT—SEISIN—DEED.**—The facts alleged in the complaint were in substance as follows: M. by deed of date October 27, 1877, for a valuable consideration conveyed to plaintiff a lot of land in San Francisco "particularly described as follows: Commencing on the southeasterly line of Minna street at a point distant one hundred and sixty feet eight inches northeasterly from the northeasterly line of Tenth street; thence running northeasterly along said line of Minna street twenty-two

RIGHT OF WAY (Continued).

feet eight inches; thence at right angles southeasterly eighty feet; thence at right angles southwesterly twenty-two feet eight inches; and thence at right angles northwesterly eighty feet to said southeasterly line of Minna street at the point of commencement; *together with the right of way in, upon and over a street thirty-five feet in width called Minna street, running from Tenth street to the southwesterly line of the lot of land thereby conveyed (to wit, said last described parcel of land) ; said street forever to be and remain free and open as a public street.*" At the date of the deed, M. was the owner of an undivided sixth part of a tract of land including the strip of land referred to as Minna street from Tenth street to within a short distance of the land conveyed, and was the owner in severalty of a tract of land which included the balance of the strip up to the land conveyed—said strip of land being in fact not a street but private property. After the death of M. by a decree in an action of partition to which the plaintiff was not a party, a portion of the land thus held in common, including a portion of the so called Minna street, was allotted to the defendants herein (who are the widow and children and heirs of M.) and the balance of the said land including the greater part of the so called Minna street was allotted to other parties; and thereby the ingress and egress of the plaintiff over the said Minna street to Tenth street became for the greater part of the way impracticable except with the consent of the owners. Afterwards by a decree of distribution in the Probate Court the tract of land allotted to the defendants herein in the partition suit, and also the tract owned by M. in severalty extending from the land conveyed northerly to Mission street were distributed to the defendants. The plaintiff requested the defendants to open Minna street as in said deed described or otherwise, to afford plaintiff means of ingress and egress to and from his said land, and they refused to do so. The prayer of the complaint was for specific performance and for general relief. Judgment went for the defendants on demurrer to the complaint.

Held: The words "street forever to be and remain free and open as a public street"—if they constitute any covenant, are either a covenant of seisin or a covenant of warranty, or for quiet enjoyment. If construed as a covenant of seisin, there was a breach as soon as the covenant was executed, and the plaintiff claim for the breach should have been presented to the administratrix of the estate of M.; if a covenant of warranty or for quiet enjoyment, the heirs are not bound, as they are not named in the covenant, and the breach occurred after the death of the covenantor. *McDonald v. McElroy*, 484.

2. ID.—ID.—ID.—ID.—ID.—ID.—At common law, to make the heir responsible, it was essential that he be expressly named in the bond or covenant of his ancestor; and in this State there was no statute which made the lands descended to the heir liable for the covenants of the ancestors, except the statute which applied all assets to the payment of decedent's debts—through the machinery of the Probate Court.—*Id.*
3. ID.—RIGHT OF WAY OF NECESSITY.—*Held*, further that plaintiff is not entitled to a right of way of necessity over defendant's lands.—*Id.*
4. ID.—ID.—CASE DISTINGUISHED.—*Taylor v. Warnaky*, 55 Cal. 350, has no application to this case.—*Id.*

ROAD BED. See TAXATION, 14.

ROAD PROPERTY TAX. See ROAD TAX.

ROAD TAX.

ROAD TAX—ROAD PROPERTY TAX—CITY OF SANTA CRUZ—MUNICIPAL CORPORATION.—Under Section 2864 of the Political Code, the road tax and property tax provided for in the preceding sections can not be levied or collected from the inhabitants or property of incorporated towns and cities, which by municipal authority levy such taxes for the streets and alleys thereof.—*Martin v. Aston*, 63.

ROADWAY. See TAXATION, 8, 14.

ROBBERY.

1. **ROBBERY—VERDICT.**—Upon the trial of an information for robbery, the verdict was as follows: "We, the jury, find the defendant guilty as charged in the information;" and it was claimed that the crime of robbery charged in the information, also involved the crime of grand larceny, of which it was within the power of the jury to find the defendant guilty, and that the verdict should have specified which of these two crimes, robbery or grand larceny, the defendant was found guilty of.

Held: It is no argument against the sufficiency of the verdict in this case, that robbery includes larceny, and that under an indictment and prosecution for the former, a defendant may be convicted of the latter crime. The jury in this case has found the defendant guilty as charged in the indictment, and the charge in the indictment is the crime of robbery; and we do not, therefore, discover any uncertainty in the verdict.—*People v. Gilbert*, 108.

2. **ID.—INSTRUCTION—RELEVANCY OF INSTRUCTIONS—REASONABLE DOUBT—CIRCUMSTANTIAL EVIDENCE—HYPOTHESIS—DEFINITION.**—The Court refused to give the eighth instruction asked by defendant, which was as follows: "The hypothesis contended for by the prosecution must be established to an absolute moral certainty, to the entire exclusion of any rational probability of any other hypothesis being true, or the jury must find the defendant not guilty"—the refusal being placed upon the ground that "this is not a case of circumstantial evidence, and the instruction is not responsive to the testimony in the case." The evidence given was that of the party robbed, and was direct and positive, and not circumstantial.

Held: Where all the evidence in the case is direct and positive, and the defendant's guilt is in no manner dependent upon an agreement of circumstances, there is no such thing as a hypothesis, in the theory of the prosecution, and an instruction based upon such a theory becomes irrelevant and immaterial. There was nothing in the case to warrant such an instruction, and therefore it was proper for the Court to refuse it.—*Id.*

3. **ID.—ID.—ID.—ID.—ID.—ID.—ID.**—When there is no statement or bill of exceptions embodying the evidence or declaring its purport and tendency, the appellate Court will presume in favor of the correctness of

ROBBERY (Continued).

the charge of the Judge to the jury, unless the charge is manifestly erroneous under any and every conceivable state of facts.—*Id.*

4. *Id.*—*Id.*—*Id.*—*Id.*—The Court refused to give the following instruction asked by defendant: "In order to convict the defendant upon evidence of circumstances, it is necessary, not only that all the circumstances concur to show that he committed the crime charged, but that they are inconsistent with any other rational conclusion. It is not sufficient that the circumstances proved coincide with, account for, and therefore render probable the hypothesis sought to be established by the prosecution, but they must exclude to a moral certainty every other hypothesis but the single one of guilt, or the jury must find the defendant not guilty."

Held: What has been said in reference to instruction eight is equally applicable to this one. It may be conceded that the instruction embodied the correct rule with respect to circumstantial evidence; but as there was no such evidence in the case, it was but the statement of an abstract principle of law, upon which it was in no sense the duty of the Court to charge the jury.—*Id.*

5. ROBBERY—SUFFICIENCY OF EVIDENCE—BILL OF EXCEPTIONS—AMENDMENT.—*People v. Olive*, 69.

RULES OF COURT.

RULES OF COURT—JUDICIAL NOTICE.—(SHARPSTEIN, J).—This Court does not take judicial notice of the rules of the Superior Court.—*Sweeney v. Stanford*, 363.

SALE.

1. SALE VARIANCE—PLEADING—EVIDENCE.—The complaint contained two counts, the first alleging the sale of a horse to the defendants for the sum of one thousand five hundred dollars; the second, that the defendants were indebted to the plaintiff in that sum on account of a horse delivered to them by the plaintiff at their request, which (it was alleged) was reasonably worth one thousand five hundred dollars. The proof was that the defendants agreed to give the plaintiff for the horse seven hundred and fifty dollars in money and seven hundred and fifty in horses, and that the plaintiff sold and delivered the horse to the defendant on those terms.

Held: The plaintiff ought to have counted on the agreement to deliver the horses as well as the agreement to pay the money; but as no objection was made to the proof, as to the contract on the ground of variance or otherwise, the error was waived.—*Cummings v. Dudley*, 383.

2. *Id.*—PROMISE TO PAY IN SPECIFIC ARTICLES—DAMAGES.—Where a party agrees to deliver specific property at all events, without any option on his part, and he fails to carry out the contract, he is liable in damages for the value of the property.—*Id.*
3. *Id.*—*Id.*—*Id.*—LIQUIDATED DAMAGES.—The amount fixed in the agreement of sale in lieu of which the horses were to be delivered, should be treated as liquidated damages.—*Id.*

See REAL ESTATE BROKER.

SALE BY SAMPLE. See WARRANTY, 1, 2, 3.

SALE OF PERSONAL PROPERTY. See REPLEVIN, 2, 3.

SALE OF REAL PROPERTY. See ESTATES OF DECEASED PERSONS, 2, 3;
PROMISSORY NOTE, 1.

SAN FRANCISCO. See WATER RATES, 1, 2, 3.

SAN FRANCISCO, OUTSIDE LANDS OF. See EJECTMENT, 1; MONEY
HAD AND RECEIVED, 1.

SANTA CRUZ, CITY OF. See ROAD TAX.

SATISFACTION OF JUDGMENT. See JUDGMENT, SATISFACTION OF.

SELF-DEFENSE.

1. SELF-DEFENSE—MURDER—INSTRUCTIONS.—Upon a trial for murder the Court instructed the jury as follows: To justify the commission of a homicide upon the ground that it was necessary in defense of one's property, it must be made to appear by a preponderance of the testimony that the person killed was manifestly endeavoring *and* intending to commit a felony. A bare trespass upon property does not justify or excuse a homicide. *Held*: The instruction was erroneous.—*People v. Flanagan*, 2.
2. *Id.*—*Id.*—*Id.*—Every person has a legal right, in defense of his property, to prevent the commission of a felony; and is entitled to use whatever force may be necessary—even to the extent of taking the life of a felonious aggressor.
In such a case the justification is not made to depend upon a combination of intent *and* endeavor to commit a felony, as erroneously stated in the instruction; either will be sufficient to justify resistance for prevention. *Id.*
3. *Id.*—*Id.*—*Id.*—APPARENT NECESSITY.—If from all the evidence in the case the jury should find that the circumstances were such as to excite the fears of a reasonable man, and that the defendant, acting under the influence of such fears, killed the aggressor to prevent the commission of a felony upon his person or property, he would not be criminally responsible for his death. *Id.*
4. *Id.*—*Id.*—*Id.*—BURDEN OF PROOF—REASONABLE DOUBT.—The instruction was erroneous also, because it tended to deprive the defendant of the doctrine of reasonable doubt. It is a cardinal rule in criminal prosecutions that the burden of proof rests upon the prosecutor, and that if, upon the whole evidence, including that of the defense as well as that of the prosecution, the jury entertain a reasonable doubt of the guilt of the accused, he is entitled to the benefit of that doubt. *Id.*
See JUSTIFIABLE HOMICIDE, 1, 2.

SERVICE OF AMENDMENT. See AMENDMENT, 5.

SERVICE OF NOTICE OF APPEAL. See JURISDICTION, 7.

SERVICE OF SUMMONS.

AFFIDAVIT OF SERVICE OF SUMMONS—JUDGMENT BY DEFAULT.—An affidavit of service of summons which fails to state that the affiant was over the age of eighteen years *at the time of the service*, is insufficient to support a judgment by default.—*Weil v. Bent*, 603.

See JUDGMENT BY DEFAULT, 1.

SHORE OF THE SEA. See TIDE LAND, 1.

SLANDER OF TITLE.

1. **SLANDER OF TITLE—COMPLAINT—PLEADING—REDEMPTION OF LAND.**—In an action for slander of title the complaint in effect alleged "that during the entire year of 1878, up to October 26, plaintiff was the owner in fee as her separate property" of a tract of land in Sonoma County; that on October 26, 1878, the Sonoma Valley Bank caused the said land to be sold, under a decree of foreclosure of mortgage thereon; that at the sale the defendant became the purchaser of the land for seven thousand six hundred and sixty dollars; "and the plaintiff had the period of six months, from October 26, 1878, in which to redeem from the sale;" that for the purpose of redemption, she entered into negotiations with one Otto Schetter and others for the sale of said land; and Schetter had agreed to purchase the same from her, and pay her therefor ten thousand dollars, but he was dissuaded and prevented from completing the purchase by the defendant, on December 10, 1878, maliciously and without probable cause, speaking in the presence and hearing of the said Otto Schetter and others, the following words concerning the said property and the plaintiff, (here follow the words complained of); that these words were "false and made with the intent to prevent any sale of the property by the plaintiff, or any sale of her right to redeem," *per quod* the plaintiff was damaged nine thousand dollars for which she asked judgment with costs.

Held: The complaint shows affirmatively that the plaintiff was owner in fee of the land only until October 26, 1878, when the defendant acquired title to it as purchaser at the foreclosure sale; and that the alleged slander of title was published December 10, 1878, at which time it follows that the plaintiff was *not* the owner. The averment that she was entitled to redeem the mortgaged premises within six months after the sale to the defendant, is a mere conclusion of law unsustained by any affirmative averment of fact. To entitle the plaintiff to the *status* of a redemptioner, it should have been alleged that she was the mortgagor, or judgment debtor, or the successor in interest of the judgment debtor, or a creditor having a *lien* by judgment or mortgage on the property sold, etc.—*Edwards v. Burris*, 157.

2. **ID.—ID.—ID.**—Such an action is only maintainable by one who possesses an estate or interest in real or personal property, against one who maliciously comes forward and falsely denies or impugns his title thereto, if thereby damage follows to the plaintiff.—*Id.*

STARE DECISIS. See SUNDAY LAW, 1, 2.

STATE. See TERRITORIAL JURISDICTION OF, 1, 2.

STATE BOARD OF EQUALIZATION. See TAXATION, 1, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15.

STATE LANDS.

1. STATE LANDS—CONTEST—JURISDICTION—SURVEYOR GENERAL—APPLICATION TO PURCHASE UNDER AMENDATORY ACT OF APRIL —, 1870—JUDGMENT.—After judgment has been entered in an action upon a reference of a contest by the Surveyor General to determine the right of contestants to purchase State lands, it is the duty of the Surveyor-General to obey the judgment, and mandamus will lie to compel him. So held in a case where the jurisdiction of the District Court was called in question, on the ground that the amendatory Act of April, 1870—under which the plaintiff's application was made—was void.—*Cunningham v. Shanklin*, 118.

2. ID.—ID.—ID.—ESTOPPEL.—In such case the State and its officers are estopped from selling the same land to an applicant who filed his claim pending the action or subsequent thereto; and the reception and filing of such an application does not create such a contest as to authorize a reference to the Court under Section 3314, Political Code.—*Id.*

See STATE PATENT.

STATE PATENT.

STATE PATENT—STATE LANDS—JURISDICTION OF LAND OFFICERS.—Affirmed on the authority of *O'Connor v. Frasher*, 56 Cal. 499.—*O'Connor v. Good*, *O'Connor v. Hazard*, 622.

STATEMENT. See BILL OF EXCEPTIONS, 1, 2; NEW TRIAL, 1; TAXATION, 7.

STATEMENT OF ATTORNEY TO JURY.

STATEMENT OF ATTORNEY TO JURY—TRIAL.—An erroneous statement of the testimony to the jury by counsel in the trial of cause, is not an error for which a new trial will be awarded.—*People v. Lee Ah Yute*, 95.

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STATUTES CONTINUED IN FORCE BY CODES. See CORPORATIONS, 2

STIPULATION.

STIPULATION—NEW TRIAL—BILL OF EXCEPTIONS—PRACTICE.—After a motion for a new trial had, by consent of parties, been passed upon by C., the District Judge, who tried the case—upon a bill of exceptions amended and settled but not engrossed,—a dispute arose between counsel as to the engrossment. Thereupon—June 17, 1880—it was stipulated “that the bill of exceptions, as engrossed by plaintiff, together with the bill as prepared by plaintiffs and the amendments proposed by defendants, and the order of Judge C., settling said bill, be all sent to Judge C. for him to decide if said bill is properly engrossed, and if not properly engrossed to correct the same, and sign said bill as of December 1, 1879, when so corrected.” Subsequently, Judge C., after striking out certain portions of the bill as engrossed by the plaintiffs, certified the same as correct, and afterwards the defendants moved the Judge of the Superior Court to strike out portions of the bill. *Held*, that, in view of the stipulation, it was not error to deny the motion.—*Boyd v. Burrel*, 318.

STREET. See DEDICATION OF; HARBOR COMMISSIONERS, 1-8.

STREET ASSESSMENT.

1. STREET ASSESSMENT DEMAND—RESOLUTION OF INTENTION—ADVERTISING FOR PROPOSALS—APPEAL TO SUPERVISORS —In an action to enforce

STREET ASSESSMENT (Continued).

a lien for a street assessment in San Francisco, the defense was, that there was included in the assessment as well as in the demand, a charge of fourteen cents per front foot for work done which was not authorized by the resolution of intention, nor the invitation for sealed proposals.

Held: The defense was good, and was not affected by a failure of the parties aggrieved to appeal to the Board of Supervisors.—*Donnelly v. Howard*, 291.

2. **STREET ASSESSMENT—DIAGRAM—STREET CROSSING—APPEAL TO BOARD OF SUPERVISORS.**—In an action to foreclose a lien for a street assessment, it appeared that the only objection to the assessment was purely technical, and that it did not and could not affect any substantial right or interest of the defendant.

Held: By neglecting to appeal to the Board of Supervisors, the defendant waived the objection.—*Dyer v. Parrott*, 551.

See **AMENDMENT**, 4, 5; **PRESUMPTION**, 1, 2.

STREET CROSSING. See **STREET ASSESSMENT**, 2.

SUBSEQUENT PURCHASER IN GOOD FAITH. See **UNRECORDED DEED**, 1, 2.

SUBSTITUTION OF PARTIES.

SUBSTITUTION OF PARTIES IN ACTION—ADMINISTRATOR.—*Certiorari* to review a judgment of the Superior Court upon appeal from a Justice's Court. Judgment affirmed.—*Johnson v. Superior Court of San Francisco*, 578.

SUFFICIENCY OF EVIDENCE. See **ASSAULT WITH DEADLY WEAPON**, 1; **DEATH, ACTION FOR**, 1, 2; **RAPE**; **RENT**; **REFLEVIN**, 4; **ROBBERY**, 5.

SUNDAY LAW.

1. **SUNDAY LAW—CONSTITUTIONAL LAW—POLICE POWER—HEAD LINES OF TITLES AND CHAPTERS OF CODES—STARE DECISIS—FREEDOM OF RELIGION.**—The Sunday law (§§ 300, 301 Penal Code) is not unconstitutional. (McKinstry, J., Ross, J., and Sharpstein, J., dissenting.)—*Ex parte Koser*, 177.

2. **ID.—ID.—ID.—ID.—ID.—ID.—CASE DISTINGUISHED.**—*Ex parte Westfeld*, 55 Cal. 550, distinguished.—*Id.*

See **JUDGMENT FOR PAYMENT OF FINE**, 1; **JURISDICTION**, 4, 5.

SUPERIOR COURT. See **ALIMONY PENDING APPEAL**, 2; **JURISDICTION**, 1, 4, 5, 10, 12, 13.

SUPERIOR JUDGE, APPOINTMENT BY. See **CERTIORARI**, 1.

SUPERSTRUCTURE. See **TAXATION**, 14.

SUPERVISORS.

1. **SUPERVISORS—VACANCY IN OFFICE—POWER OF APPOINTMENT.**—The amendments to the Political Code contained in the County Government
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SUPERVISORS (Continued).

bill, (so called), having been adjudged unconstitutional, there is no law authorizing an appointment by Superior Judges to fill a vacancy in the office of Supervisor; if there is power to appoint in such case it rests with the Governor, under Section 999, Political Code, or with the Board of Supervisors, under Section 4115, Political Code.—*Myers v. Board of Supervisors of Alameda County*, 287.

2. ID.—ID.—TENURE OF OFFICE.—A person elected Supervisor has the legal right to exercise and enjoy the office until his successor is duly appointed or elected.—*Id.*

See CERTIORARI, 1; CLAIM AGAINST COUNTY; STREET ASSESSMENT, 1, 2.

SUPPLEMENTAL ANSWER.

SUPPLEMENTAL ANSWER—DISCRETION OF COURT—ABUSE OF DISCRETION.—

The Court below, under the circumstances stated in the opinion, refused leave to the defendant to file a supplemental answer setting up a release by the plaintiff of his claim.

Held: The Court should have permitted the defendant to plead the release. (McKINSTRY, J., and ROSS, J., dissenting.)—*Seehorn v. Big Meadows and Bodie Wagon Road Co.*, 240.

See ESTOPPEL, 1.

SUPREME COURT.

See ALIMONY PENDING APPEAL, 1, 2; DIVORCE, 1, 2; INDICTMENT, 1; JURISDICTION, 6, 11-13.

SURETIES.

1. SURETIES OF ADMINISTRATOR—ACTION FOR ACCOUNTING—EQUITY.—

Where an administrator dies without rendering an account, jurisdiction to compel an accounting vests in the appropriate Court of Equity; and it would seem that the adjustment of the account by that Court is a prerequisite to an action against the sureties.—*Chaquette v. Ortel*, 594.

2. ID.—ID.—ID.—JUDGMENT AGAINST PRINCIPAL—MAXIM.—In such an action, where the sureties were made parties, but were afterwards dismissed, upon their objection by demurrer to being joined, the decree is conclusive against them, and they can not be heard to object that they were not parties. To this the maxim *alligans contraria non est audiendus* applies. *Id.*

3. ID.—ID.—ID.—JUDGMENT.—BREACH OF BOND.—The judgment, in such an action, does not come within the provisions of Section 1504, C. C. P., requiring a copy of the judgment to be filed among the papers of this case, but, so far at least as the enforcement of the payment, it directs against the estate of the deceased, it is to be regarded in the light of a decree of the Probate Court settling the account and directing payment; and the failure of the administratrix of the administrator to make the payment constitutes a breach of the bond, for which the sureties are liable.—*Id.*

See PROMISSORY NOTE, 2; JUDGMENT AGAINST; UNDERTAKING ON ATTACHMENT, 4.

SURVEY. See EJECTMENT, 8; TIDE LAND, 2.

SURVEYOR GENERAL. See STATE LANDS, 1, 2.

SWAMP LAND ASSESSMENT.

1. **SWAMP LAND ASSESSMENT—RECLAMATION—JOINDER OF ACTIONS.**—Two assessments for reclamation purposes in a swamp land district made on the same land at different times may be recovered in the same action.—*Swamp and Overflowed Land District No. 110 v. Feck*, 403.
2. **ID.—ID.—CASE DISTINGUISHED.**—*Dyer v. Barstow*, 50 Cal. 652, is not a parallel case.—*Id.*
3. **ID.—ID.—ESTIMATE OF WORK.**—Neither the Board of Trustees of a swamp land district, nor its engineer, has authority to include in its estimate of the cost of work necessary for reclamation the value of work done before the Board had any existence.—*Id.*
4. **ID.—ID.—ID.—BY-LAW.**—A by-law providing that the value of work already done should be included in such estimate is inconsistent with the provisions of the Code upon the subject.—*Id.*

SWAMP AND OVERFLOWED LANDS. See TIDE LAND, 2.

TAX. See LICENSE TAXES, 1.

TAXATION.

1. **TAXATION—ASSESSMENT—STATE BOARD OF EQUALIZATION—RAILROAD CORPORATIONS—CONSTITUTIONAL LAW.**—The provision of Section 10, Article xiii, of the Constitution, that the property of railroads operated in more than one county shall be assessed by the State Board of Equalization, is clearly self-executing, and the power thus conferred may be exercised without the aid of any statute.—*S. F. & N. P. R. R. Co. v. Board of Equalization*, 12.
2. **ID.—POLITICAL CODE—TITLE OF ACT—CONSTITUTIONAL LAW.**—The title of the Act of March 23, 1880, entitled "An act to amend Sections 3607, 3617, 3627, 3628, 3629, 3630, 3634, 3640, 3643, 3650, 3651, 3652, 3663, 3673, 3678, 3679, 3717, 3730, 3752, 3756, 3839, 3861, and to repeal Sections 3680, 3887, of an act entitled "An act to establish a Political Code, approved March 12, 1872, relating to revenue, and to add two new sections numbered 3664, 3665," sufficiently expresses the subject of the act.—*Id.*
3. **ID.—STATE BOARD OF EQUALIZATION—EQUALIZATION OF ASSESSMENT ROLL—NOTICE.**—Section 9, Article xiii, of the Constitution, so far as it relates to the State Board, has reference to equalization *between counties*; and the same is true of Subdivision 9, Section 3692, of the Political Code.—*Id.*
4. **ID.—ID.—ID.**—The State Board has not the power to increase or lower any individual assessment.—*Id.*
5. **ID.—STATE BOARD OF EQUALIZATION—RAILROAD CORPORATIONS—EQUAL PROTECTION OF THE LAWS—CONSTITUTIONAL LAW.**—The provision of the Constitution requiring the property of railroad companies operated in more than one county to be assessed by the State Board of Equaliza-

TAXATION (Continued).

tion, is not in conflict with the provision of the fourteenth amendment of the Constitution of the United States, that "no State shall deny to any person the equal protection of the laws." The fact that the value of one kind of property is to be ascertained by one officer or board, and the value of another by another—each clothed with the duty and responsibility of ascertaining the *actual* value—does not operate to deprive the owners of either kind of property of legal protection.—*Id.*

6. ID.—ID.—ID.—CONSTITUTIONAL LAW—LOCAL OR SPECIAL LAW.—As to the proposition that Section 10 of Article xii conflicts with Subdivision 10 of Section 25 of Article iv, without pausing to inquire which of the two provisions should be disregarded if they could not co-exist, it is enough to say that the section of the Constitution first mentioned is not "a local or special law," passed by the Legislature.—*Id.*
7. ID.—ID.—ID.—ASSESSMENT—STATEMENT.—The sworn statement required of the president of railroad corporations by Section 3664, Political Code, is not binding upon the Board, and may be disregarded by it in the assessment.—*Id.*
8. ID.—ASSESSMENT—RAILROADS—DESCRIPTION OF ROADWAY.—A description of the "roadway," by giving the *termini*, courses, and distances, is sufficient.—*Id.*
9. ID.—STATE BOARD OF EQUALIZATION—ASSESSMENT OF RAILROADS—CITY AND TOWN TAXATION.—It is not necessary, in the present case, to decide whether Section 10 of Article xiii of the Constitution intends to make the assessment by the State Board of railroad property the assessment upon which the taxes in cities, etc., on such property shall be collected for local purposes. Even if Sections 3664-3665, Political Code, were of no effect so far as they make their assessment the basis of city and town taxation, the assessment involved in this case would be valid for other purposes.
Id.
10. ID.—ID.—ID.—FISCAL YEAR.—The Political Code (§ 3692) provides that the State Board of Equalization shall assess railroad property annually, on or before the first Monday in March. The order of assessment thus made need not declare the particular fiscal year or years to which it is applicable.—*Id.*
11. ID.—ID.—ID.—In this case the order assesses separately the franchise, roadway, roadbed, rails, and rolling stock, and it is therefore unnecessary to determine whether it was obligatory on the Board to do so.—*Id.*
12. ID.—ID.—ID.—APPORTIONMENT.—The Constitution does not in terms require that the assessed value of each item should be separately *apportioned*, and that the Political Code does not contemplate such separate distribution is sufficiently apparent from Section 3650.—*Id.*
13. ID.—ID.—ID.—EQUALIZATION—PETITION.—By Section 3664, Political Code, the Board must meet on or before the third Monday of August to equalize the valuation of property *as between the several counties*; but a reconsideration (or equalization) of the assessment of railroad property can only be made by the Board in case a petition shall be filed by a party interested within *five days* after the assessment is made and entered.—*Id.*
14. ID.—ID.—ID.—DOUBLE TAXATION—ROADBED—ROADWAY—SUPERSTRUCTURE—DEFINITION.—The *roadbed* is the foundation on which the

TAXATION (Continued).

- superstructure of a roadway rests; the roadway is the right of way—which is property liable to taxation; the rails in place constitute the superstructure. An assessment of these items separately does not constitute double taxation.—*Id.*
15. *Id.*—*Id.*—*Id.*—APPORTIONMENT.—The Constitution does not require that the apportionment to cities and towns and to counties shall be one act.—*Id.*
 16. *Id.*—AMENDMENT OF CODE—TITLE OF ACT—CONSTITUTIONAL LAW.—The Act of May 12, 1881, is entitled, "An act to amend Section 3713 of the Political Code, and to provide for the levy of the tax for State purposes for the thirty-third and thirty-fourth fiscal years." *Held*: The title distinctly expresses the single object of the Act.—*Id.*
 17. *Id.*—CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER—CASE DISTINGUISHED.—The act referred to does not attempt to confer the power of levying a tax upon the State Board. In *Houghton v. Austin*, 47 Cal. 646, it was held that Section 3666 of the Political Code, as the section read originally, in so far as it delegated to the State Board the power to fix the rate of taxation, "after allowing for delinquency in the collection of taxes," was unconstitutional, because it was a delegation of legislative power. That section left it entirely in the hands of the Board to add any sum of percentage they might deem proper in anticipation of possible delinquencies. Such attempted delegation of legislative power is not found in the act now under consideration.—*Id.*
 18. TAXATION—ASSESSMENT—RAILROAD COMPANIES—MORTGAGE—CONSTITUTIONAL LAW.—Under the Constitution of this State, the property of railroad and other quasi public corporations is subject to assessment and taxation, without deduction of the amount of any mortgage or like lien thereon.—*Central Pacific Railroad Company v. State Board of Equalization*, 35.
 19. *Id.*—*Id.*—*Id.*—*Id.*—*Id.*—This provision is not in conflict with the Fourteenth Amendment to the Constitution of the United States. The provision of that section, that no State shall "deny to any person within its jurisdiction the equal protection of the laws," applies to natural persons only, and does not apply to corporations, or artificial persons.—*Id.*
 20. *Id.*—*Id.*—*Id.*—*Id.*—*Id.*—PERSON—DEFINITION.—Section 9 of Article xiii of the Constitution (relating to the equalization of county assessment rolls), has no relation to the assessments of the property of railroad corporations operated in more than one county.—*Id.*
 21. *Id.*—*Id.*—*Id.*—FRANCHISE—CONSTITUTIONAL LAW.—The franchise of the Central Pacific Railroad Company is property subject to taxation; and is not exempt from taxation by reason of its being a means or instrumentality employed by Congress to carry into operation the powers of the general Government.—*Id.*

See LICENSE TAXES, 1.

TAXATION OF SATISFIED MORTGAGE.

1. TAXATION OF SATISFIED MORTGAGE—CONSTITUTIONAL LAW.—The provision of the Constitution as to the taxation of mortgages applies to mortgages executed prior thereto.—*McCoppin v. McCartney*, 367.

TAXATION OF SATISFIED MORTGAGE (Continued).

2. **ID.—ID. VESTED RIGHT.**—A mortgage prior to the adoption of the new Constitution did not have a vested right of exemption from taxation which extended beyond the life of the former Constitution. Even if he had a contract with his mortgagor by which the latter agreed to pay all taxes, a change in the law which imposed the duty on him to pay the tax in the first instance would not violate the obligation of the contract.—*Id.*
3. **ID.—ID.—MORTGAGOR AND MORTGAGEE.**—An erroneous assessment of a mortgage already satisfied is not void. In such case (Pol. C. § 3678) by operation of law the tax on the mortgagee's interest is valid only against the real estate, and payable by the owner of the land whose estate has been enlarged by the release of the mortgage lien.—*Id.*

TENANTS IN COMMON. See **MONEY HAD AND RECEIVED**, 1.

TENURE OF OFFICE. See **SUPERVISORS**, 2.

TERRITORIAL JURISDICTION OF THE STATE.

1. **TERRITORIAL JURISDICTION OF THE STATE—COUNTY GOVERNMENTS—MONO COUNTY WARRANTS.**—By an Act of the Legislature passed in 1861 for the creation of the County of Mono, the eastern boundary of the State was made the eastern boundary of the County and it was provided, that the seat of justice should be at Aurora; but upon the definite location of the State boundary line under legislative authority it was ascertained that Aurora was within the then Territory of Nevada, and thereupon, (in year 1864) an Act was passed establishing the County seat at Bridgeport, a point west of the State line. By the former Act an election of County officers was provided for, and seven persons were named, (all of them residents of Nevada Territory), to constitute a Board of Commissioners to designate the election precincts in the County, canvass the returns and issue certificates of the election and officers were accordingly elected and qualified and assumed to perform official functions. In an application for a writ of mandamus to the Treasurer of the County of Mono to compel him to pay certain warrants drawn by the Auditor thus elected in the years 1862 and 1863, endorsed "presented and not paid for want of funds" by the person then assuming to act as County Treasurer, the Court below denied the writ.

Held: The writ was properly denied. Neither the warrants nor the claims upon which they are based form any basis for a legal demand against the County as now organized. The action of the Legislature in naming Aurora as the seat of justice, and in naming persons as officers who are non-residents of the State whether regarded as a mistake, or as an intended assertion of jurisdiction, was in excess of its authority.—*Reddy v. Tinkum*, 458.

2. **ID.—ID.**—The legislative authority of every State must spend its force within the territorial limits of the State; it has no extra-territorial jurisdiction.—*Id.*, 459.

THINGS PUBLIC. See **TIDE LAND**, 1.

TIDE LAND.

1. **TIDE LAND—CERTIFICATE OF PURCHASE—SHORE OF THE SEA—THINGS PUBLIC—ACTION TO QUIET TITLE.**—In an action by the State to cancel a certificate of purchase of a tract of tide land issued to the defendant, under the Act of April 27, 1863, the Court, in effect, found that the tract in controversy (which embraces some sixty-eight acres) is a portion of the frontage of the Bay of Monterey, which, for more than twenty-five years has been, and still is, used for commercial and maritime purposes—being that portion of the frontage of the bay at which sea-going vessels trading with Santa Cruz touch and load and unload; that much the greater portion of the land was and is permanently beneath the waters of the bay, and that all of it—except some points and bluffs comprising not over one or two acres—was, at the date of the survey and application, under which the appellant claims, covered by the waters of ordinary tides; that the whole of the tract (except the points and bluffs above referred to) was and is loose drifting sands, shifting with the action of the waves and winds; that none of the tract was, at the time of the survey and application, or is now, of any value for agricultural purposes; and that the cost of reclaiming it would greatly exceed its value when reclaimed for any purpose of tillage and agriculture.

Held: The finding in effect is that the land was not reclaimable for agricultural purposes; and, applying this test the judgment of the Court below annulling and cancelling the certificate must be affirmed.—*People v. Cowell*, 400.

2. **ID.—SWAMP AND OVERFLOWED LANDS—SURVEY—COUNTY SURVEYOR.** Under Sections 3 and 7 of the Act of April 27, 1863—cited *supra*—the duty of the County Surveyor does not commence, nor can he officially act concerning any application, until the affidavit and application for a survey are officially put before him. A survey made before this is done, is but the survey of a private person and has no official sanction.—*Id.*

TIME. See **EJECTMENT**, 4-7.

TITLE OF ACT. See **TAXATION**, 2, 16.

TITLES AND CHAPTERS OF CODES, HEAD LINES OF. See **SUNDAY LAW**, 1, 2.

TOLLS. See **HARBOR COMMISSIONERS**, 5, 6, 8.

TONNAGE. See **HARBOR COMMISSIONERS**, 4.

TRANSCRIPT. See **APPEAL**, 8, 9.

TRANSFER OF CASES FROM COUNTY COURT. See **JURISDICTION**, 7, 8, 9.

TRANSSHIPMENT OF CARGO. See **MARINE INSURANCE**, 1, 2.

TRESPASS. See **JURISDICTION**, 11.

TRIAL. See JURISDICTION, 2; MURDER, 3; STATEMENT OF ATTORNEY TO JURY.

TRUST. See OVERDRAFT, 4; PATENT, 1, 2.

TRUSTEE. See PARTIES.

UNDERTAKING ON APPEAL.

1. **UNDERTAKING ON APPEAL—JUDGMENT AGAINST SURETIES—NOTICE.**—Where an undertaking is given under Section 942, C. C. P., to stay the execution of a judgment or order directing the payment of money, and the judgment or order is affirmed, the prevailing party is entitled—if the appellant does not pay the judgment or order within thirty days after the filing of the remittitur—to have judgment against the sureties upon his motion; and of this motion the law requires no notice; for the sureties stipulate in the undertaking that judgment may be so entered. *Meredith v. Santa Clara Mining Association of Baltimore*, 617.
2. **ID.—ID.—SATISFACTION OF JUDGMENT—PRACTICE.**—In such cases, if, in fact, the original judgment was paid, although not satisfied of record, the parties have their remedy, under Section 675, C. C. P., to have satisfaction entered, and for that purpose, to recall any execution which may have been issued against them; or they may have the judgment vacated or annulled.—*Id.*
3. **ID.—ID.—PRESUMPTION IN FAVOR OF JUDGMENT.**—In this case, there being nothing in the judgment-roll to the contrary, the intendment is, if necessary, that the Court below found that the appellants had notice. *Id.*

See APPEAL, 1, 2, 3.

UNDERTAKING ON ATTACHMENT.

1. **UNDERTAKING ON ATTACHMENT—CITY AND COUNTY—CITY.**—Section 1058, C. C. P.—providing that no bond, written undertaking or surety can be required of the State or the people of the State, or any state officer in his official capacity, or “any County, City, or Town” in any civil action or proceeding in which they are parties, etc.—applies to the City and County of San Francisco.—*Morgan v. Menzies*, 341.
2. **ID.—ID.—ID.—DEFINITION.**—The term *City* includes in its signification *City and County.*—*Id.*
3. **ID.—ID.—ID.—COMMON LAW BOND—ILLEGAL CONSIDERATION—POLICY OF THE LAW.**—An attachment undertaking given by the City and County in a suit in which it is plaintiff, is in contravention of the policy of the law, and therefore void as a common law bond.—*Id.*
4. **ID.—BREACH OF CONDITION—PLEADING—SURETIES.**—In an action against the sureties in an undertaking, the condition of the undertaking was that if the defendant recovered judgment the plaintiff would pay all costs that might be awarded to the said defendant, and all damages which he might sustain by reason of said attachment, not exceeding, etc.; but there was no averment in the complaint that the plaintiff had not paid, or even that a demand had been made.

UNDERTAKING ON ATTACHMENT (Continued).

Held: The complaint was fatally defective. The breach of the contract being obviously an essential part of the cause of action must in all cases be stated in the declaration; and the omission to allege a breach can not be aided or cured even by verdict.—*Id.*

UNITED STATES DISTRICT COURT, JURISDICTION OF. See EJECTMENT, 8.

UNLAWFUL DETAINER.

1. **UNLAWFUL DETAINER—LANDLORD AND TENANT—DEMAND FOR RENT.**—In an action by a landlord against a tenant for holding over after default in the payment of rent and demand therefor, the demand proved was for "the sum of ten dollars which became and was due from you as such rent to us on the twenty-eighth day of April, 1879, for the *preceding* month of your tenancy," etc. and it was objected that the notice failed to denote *what* preceding month was intended: *Held:* The notice was sufficiently definite.—*Newman v. Bird*, 372.
2. **ID.—VERIFICATION OF PLEADING BY AGENT.**—In an action of unlawful detainer the complaint was verified by an agent of the plaintiff, who stated in the affidavit that the facts stated in the complaint were within the knowledge of affiant. *Held:* The complaint was properly verified.—*Id.*
3. **ID.—OTHER ACTION PENDING—FINDING—CONCLUSION OF LAW.**—Upon the issue of another action pending in the same Court for the same cause of action, the Court found "that there was not at the time of the commencement of this action any other action pending in this Court between the parties to this action for the same cause of action mentioned and contained in the cause of action set forth in the complaint in this action." *Held:* The finding was sufficient.—*Id.*

UNLAWFUL ENTRY. See **FORCEFUL DETAINER**, 1, 2.

UNREASONABLE ORDINANCE. See **MUNICIPAL ORDINANCE**, 4.

UNRECORDED DEED.

1. **UNRECORDED DEED—SUBSEQUENT PURCHASER IN GOOD FAITH—RECITAL OF CONSIDERATION IN DEED—EVIDENCE.**—M. purchased land, but caused the deed to be taken in the name of J., and the deed was duly recorded. M. took possession, and afterwards at his request the property was conveyed to him by J.; but the deed was not recorded until after the commencement of this action. Afterwards, at the instance of M., J. made a deed to the plaintiff, then a single woman but subsequently the wife of M. This deed recited a consideration of six thousand dollars, and was delivered and recorded after the marriage—the plaintiff having no notice of the former deed; but there was no proof as to the consideration. Afterwards M. sold and conveyed the land to the defendant for the sum of twelve thousand dollars. J. sues to recover the land. *Held:* It is apparent that the legal title to the premises is with defendant. It is only subsequent purchasers for a *valuable consideration* who

UNRECORDED DEED (Continued).

are protected against prior conveyances unrecorded; within which category plaintiff does not come.—*Morse v. Wright*, 260.

2. *Id.*—*Id.*—*Id.*—*Estoppel*.—There is no ground for the operations of the doctrine of estoppel in favor of the plaintiff against the defendant. *Id.*

USAGE. See OVERDRAFT, 1; WARRANTY, 3.

VACANCY IN OFFICE. See SUPERVISORS, 1, 2.

VARIANCE. See LARCENY, 3; PROMISSORY NOTE, 5; SALE, 1.

VERIFICATION OF PLEADING BY AGENT. See UNLAWFUL DETAINER, 2.

VERDICT. See DEATH, ACTION FOR, 2; DEFECTS CURED BY; ROBBERY, 1.

VESTED RIGHT. See TAXATION OF SATISFIED MORTGAGE, 2.

WAIVER. See MOTION TO SET ASIDE JUDGMENT, 1, 2.

WARRANTS. See MONO COUNTY WARRANTS.

WARRANTY.

1. WARRANTY—SALE BY SAMPLE.—Where goods are sold by sample the law implies a warranty that the article shall not be inferior in quality to the sample; and if they are, the purchaser may accept them, and bring an action for the breach of warranty.—*Hughes v. Bray*, 284.
2. *Id.*—*Id.*—MEASURE OF DAMAGES.—In an action for breach of warranty of the quality of barley sold by defendant to the plaintiff, the Court instructed the jury in effect that the measure of damages was the difference between the market value of the barley actually delivered, and the market value of an equal quantity of barley of the same quality as the sample at the time of delivery.

Held: The charge was in accordance with the rule contained in Section 3313, Civil Code.—*Id.*

3. *Id.*—*Id.*—CUSTOM—USAGE.—The defendant offered to prove the existence of a general custom and usage among the grain dealers in San Francisco that sales of grain by sample are not considered complete until the buyer has actually inspected and accepted the grain sold. *Held*: The evidence was properly rejected.—*Id.*

See RIGHT OF WAY, 1, 2.

WATER RATES.

1. WATER RATES—ORDER NUMBER 1573 ESTABLISHING WATER RATES IN THE CITY OF SAN FRANCISCO—CONSTITUTIONAL LAW.—By an ordinance of the Board of Supervisors of San Francisco known as "Order No. 1573," establishing water rates—it is provided that "The rates of compensation to be collected for water supplied to the city and county of San Francisco for municipal purposes shall be as follows: Fifteen (\$15) dollars per month

WATER RATES (Continued).

for each and every hydrant for fire purposes and for flushing sewers. Five hundred (\$500) dollars per month for water furnished to Golden Gate Park. Seven thousand (\$7,000) dollars per month for water furnished for all the public buildings * * * due and payable at the end of the month ;" and rates are also prescribed to be collected for water furnished for domestic and other purposes to private consumers. But, it is also provided that "in case the rates or compensation hereby fixed for water supplied to the city and county of San Francisco for municipal purposes shall be fully paid monthly by the said city and county to the Spring Valley Water Works, the same shall be allowed by said corporation upon the rates charged to its consumers other than the city and county, for the month succeeding the month in which the same are collected, and in such manner that the rates to such consumers for such succeeding month shall be diminished twenty-five (25) per cent., or such proportion thereof as may be collected from said city and county.

Held: The order does not fix the rates of compensation for the use of water, but leaves them indefinite and uncertain; and is therefore not a valid execution of the power conferred upon the Board of Supervisors by Section 1, Article xiv, of the Constitution.—*San Francisco Pioneer.Woolen Factory v. Henry Brickwedel, Auditor, etc., and Spring Valley Water Works*, 186.

2. ID.—ID.—ID.—(MYRICK, J., concurring.)—The Board of Supervisors of the city and county of San Francisco has had, since the new Constitution went into effect, and has, the power to fix and determine the rates or compensation to be collected by the Spring Valley Water Works as well from the city and county (for water used for fire purposes, for flushing sewers, for public buildings and offices, for sprinkling streets and for beautifying parks), as from private persons; any provision in any statute to the contrary notwithstanding.—*Id.*
3. ID.—ID.—ID.—CASE EXPLAINED—(ROSS, J., concurring.)—The construction placed on the provisions of the new Constitution in relation to water in the case of the *Spring Valley Water Works v. The Board of Supervisors of San Francisco*, 58 Cal.,—necessarily results in relieving that Company of the obligation to furnish water to the city and county of San Francisco free of charge for any purpose.—*Id.*

WAY OF NECESSITY. See **RIGHT OF WAY**, 3, 4.

WEIGHT OF EVIDENCE. See **LARGENTY**, 2.

WHARFAGE. See **HARBOR COMMISSIONERS**, 1-8.

WITNESS. See **CREDIBILITY OF; IMPEACHMENT OF.**

WITNESS, CREDIBILITY OF.

CREDIBILITY OF WITNESS—CONVICT—INSTRUCTION.—The Court below did not err in refusing to instruct the jury, that, "A witness who has been convicted of the crime of burglary, and served out a term of imprisonment for such crime, is not entitled as a witness to full credit at your hands."—*People v. McLane*, 412.

See **LARGENTY**, 2.

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